Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JAMES M. McGOWAN, SR.,

Petitioner,

v.

NJR SERVICE CORPORATION and
NEW JERSEY NATURAL GAS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should plan administrators covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, be mandated by federal common law to recognize a waiver of a beneficial interest?

2. Does a requirement that plan administrators consider external documents other than the plan documents in order to decide the validity of a waiver violate 29 U.S.C. § 1104(a)(1)(D)?

3. Does the recognition and enforcement of a waiver by a plan administrator undermine ERISA's goals that plans be uniform in their interpretation and simple in their administration?

4. Does the recognition and enforcement of a waiver by a plan administrator contravene the anti-alienation provisions of ERISA, 29 U.S.C. § 1056(d)(1)?

PARTIES TO THE PROCEEDING

James M. McGowan, Sr., Palm City, Florida, Petitioner.

NJR Service Corporation and New Jersey Natural Gas Company, Wall Township, New Jersey, Respondent.

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CITATION OF OPINION OF LOWER COURT

The Court of Appeals decision is published at *McGowan v. NJR Service Corporation*, 423 F.3d 241 (3d Cir. 2005). The District Court opinion is not published. *See* Appendices A-B.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Third Circuit entered its ruling on September 13, 2005. *See* Appendix A. McGowan petitioned for rehearing *en banc* on September 26, 2005. The Court of Appeals denied the petition on October 13, 2005. *See* Appendix C. The Supreme Court is authorized to consider this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

29 U.S.C. § 1056(d)(1):

> d) Assignment or alienation of plan benefits
>
> > (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1104(a)(1)(D):

> (a) Prudent man standard of care
>
> > (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to

> a plan solely in the interest of the participants and beneficiaries and – (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Petitioner James M. McGowan, Sr. (hereinafter "McGowan" or "Petitioner") was employed by Respondent New Jersey Natural Gas Company ("NJNG") from May 12, 1969 until he retired on November 30, 1996. He participated in NJNG's Plan for Retirement Allowances for Non-represented Employees (the "Plan").

At the time of his retirement which was effective December 1, 1996, he was married to his second wife, Rosemary Byrne (hereinafter sometimes "Rosemary"). He designated her as his "joint and survivor contingent beneficiary" of his pension. This was pursuant to the "automatic surviving spouse option" of the Plan which thereby created a 50% survivor annuity for Rosemary. This annuity was funded by a $212.00 monthly reduction in McGowan's pension.

McGowan and Rosemary were divorced on May 24, 1999 in Palm Beach County, Florida. Prior to said divorce they had entered into a Marital Settlement Agreement (hereinafter sometimes the "Agreement") on July 23, 1998 which

was incorporated into the final judgment of divorce. The Agreement provided in pertinent part that Rosemary

> waives any and all rights, title, interest or claims . . . to all bank accounts, insurance policies and any right to the New Jersey Natural Gas Company Employee Pension Plan of the Husband.

On July 27, 1998 Rosemary also executed a form consenting to a change of McGowan's retirement beneficiary to Shirley McGowan (hereinafter sometimes "Shirley"), McGowan's first wife of 32 years. McGowan thereupon requested, through his prior counsel, that the plan administrator change the beneficiary selection to Shirley. On August 6, 1998, that request was denied. He neither appealed said denial further nor sought to litigate same in a court of law.

On November 3, 2001 McGowan married Donna McGowan (hereinafter sometimes "Donna"), his third wife. He sought to have her recognized as his new contingent beneficiary. NJNG refused however to recognize this nomination and maintained that Rosemary would remain the contingent beneficiary under the Plan. He thereafter appealed this decision to the Plan's Claims Administration Committee which upheld the decision below on April 30, 2002. Accordingly, all administrative appeals were thereby exhausted.

On March 5, 2003 McGowan commenced an action in the United States District Court for the District of New Jersey, seeking a judgment directing NJNG and the Plan to recognize Rosemary's waiver of her rights as McGowan's beneficiary and to further recognize his subsequent nomination of his present wife, Donna, as the new contingent beneficiary.

The jurisdictional basis of the lawsuit was 29 U.S.C. § 1132(a)(1)(B) and (e). McGowan also sought the imposition of civil penalties pursuant to 29 U.S.C. § 1132(c) against NJNG for its failure to timely produce requested documents. McGowan does not petition for review on the denial of civil penalties or the affirmance of said denial.

The District Court, *per* Hon. Stanley Chesler, U.S.D.J., held that the rule announced by a minority of the Circuit Courts more appropriately comports with Congressional intent in establishing simple and uniform administration of ERISA benefit plans and fulfills the statutory mandate that fiduciaries discharge their obligations "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). *See also Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993); *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990). Accordingly the District Court denied McGowan's motion for summary judgment and granted NJNG's cross-motion for summary judgment.

McGowan appealed to the Court of Appeals for the Third Circuit. A two-judge majority held that recognition of Rosemary's waiver coupled with McGowan's nomination of Donna as his contingent beneficiary contravened ERISA's prohibition of assignment or alienation of benefits under 29 U.S.C. § 1056(d)(1). In so holding, the majority accorded great weight to the Supreme Court's decision in *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754 (1997). In *Boggs*, the Supreme Court held that ERISA's anti-alienation provision preempted a state law permitting a testamentary transfer by a plan beneficiary. 820 U.S. at 851.

A second judge would have affirmed on the additional ground that plan administrators may not look beyond the plan documents, one of which was the original designation of Rosemary as to the beneficiary. *See* 29 U.S.C. § 1104(a)(1)(D). This judge believed that a rule which permitted consideration of other documents would undermine the principle that "plans be uniform in their interpretation and simple in their application," citing H.R. Report 93-533 (1974), 1974 U.S. Code Congressional and Administrative News 4639, 4650.

The third judge dissented. He believed that, since both ERISA and the plan are silent as to the enforceability of waivers of benefits, federal common law should respect state autonomy in the area of domestic law. He would have allowed waivers of sufficient specificity to be given effect.

McGowan thereafter timely petitioned for rehearing *en banc*. By Order dated October 13, 2005 the petition was denied.

REASONS FOR GRANTING PETITION

THE SUPREME COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO THE ENFORCEABILITY OF ERISA WAIVERS UNDER FEDERAL COMMON LAW

The Third Circuit recognized a split of circuits as to whether plan administrators may recognize a beneficiary's waiver of his or her benefits under federal common law. Five circuits hold that such waivers are valid and enforceable. *Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996), *Brandon v. Travelers Insurance Co.*, 18 F.3d 132 (5th Cir. 1994), *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990)

(*en banc*), *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir. 1995) and *Metropolitan Life Insurance Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991),

Three circuits disagree, *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 (2d Cir. 1993), *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990). *Krishna* and *McMillan* rejected the recognition of waivers based on the obligation of plan fiduciaries to consider only the plan documents under 29 U.S.C. § 1104(a)(1)(D) as well as the need for uniformity in plan interpretation and simplicity in administration. *Krishna* at 16; *McMillan* at 311-12. In the present case, the panel majority held that the recognition of waivers violates ERISA's anti-alienation provisions. 29 U.S.C. § 1056(d)(1). The Third Circuit, joining the minority of circuits and thereby creating an overall 5-3 split, noted that this case represented the fourth time in which district courts within the circuit had addressed the issue, splitting 2-2.

This petition presents not only a conflict among circuits, it presents a conflict which has recurred and which is likely to recur. The facts of this case illustrate why. When McGowan retired, he designated his wife, Rosemary, to receive spousal benefits. When they divorced and resolved their monetary issues, McGowan initially wanted this benefit to go to his ex-wife Shirley, the mother of his children. When McGowan married Donna three years later, he wanted her to receive the spousal benefits for the simple and easily understandable reason that his wife was his spouse. Even the majority of the panel judges below acknowledges the "strange" and "untoward" result obtained whereby Rosemary will one day receive a survivor annuity notwithstanding her purported waiver thereof and McGowan's present wife Donna will receive nothing.

A "principal goal(s) of ERISA is to enable employers "to establish a uniform administrative scheme which provides a set of standard procedures to guide processing of claims and disbursements of benefits," *Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S. Ct. 1322 (2001), citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 107 S. Ct. 2211 (1987). Uniformity will not be achieved however if plan administrators must operate under differing rules for differing circuits. Whether a plan participant may change his or her designation of a spousal beneficiary should not depend upon geography. What rule should apply, for example, where a plan administrator maintains its principal offices within the Third Circuit but the plan participant resides and works within the Fourth Circuit? Should the applicability of one or the other rule depend upon the inclusion of choice of law and forum selection clauses in the plan documents?

This Court could defer resolution of this issue until the First, Ninth, Eleventh and D.C. circuits have addressed it. The District of Massachusetts has adopted the majority rule, *Metropolitan Life Insurance Company v. Flinkstrom*, 303 F. Supp. 2d 34, 41 (D. Mass. 2004); the Northern District of Georgia has faced a similar but different issue, *Liberty Life Assurance Society of Boston v. Kennedy*, 228 F. Supp. 2d 1367, 1378-79 (N.D. Ga. 2002). Fifteen years have elapsed since the Sixth Circuit decided the first case addressing the issue. No new theory sustaining or rejecting petitioner's position is likely to appear. It further appears unlikely that Congress is going to resolve the conflict.

Deferral of this issue will simply mean that, over time, twelve more appellate judges will have to debate the issue. Denial of the petition will mean not only that but also that plans will be administered according to the happenstance of

geography. Several years ago, the Supreme Court resolved the issue of the applicability of the treating physician to ERISA cases because of a split in the circuits. *Black and Decker v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003). So too it should now resolve the issue of ERISA waivers for the same reason.

CONCLUSION

For the preceding reasons, Petitioner respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 13, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 04-3620

JAMES M. McGOWAN, SR.,

Appellant

v.

NJR SERVICE CORPORATION;
NEW JERSEY NATURAL GAS COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-01035)
District Judge: The Honorable Stanley R. Chesler

Argued June 8, 2005

Before FUENTES, VAN ANTWERPEN and BECKER, *Circuit Judges.*

(Filed September 13, 2005)

OPINION

VAN ANTWERPEN, *Circuit Judge.*

Appellant James M. McGowan, Sr., was employed by Appellee New Jersey Natural Gas Company ("NJNG") for

more than 27 years. He participated in NJNG's Plan for Retirement Allowances for Non-represented Employees ("the Plan") and initially designated his second wife, Rosemary, the "joint and survivor contingent beneficiary." On March 5, 2003, McGowan filed an action in the United States District Court for the District of New Jersey, seeking declaratory relief directing NJNG and the Plan to recognize: (1) Rosemary's purported waiver of her rights as beneficiary; and (2) McGowan's subsequent nomination of his present wife, Donna, as the new beneficiary.

Whether the administrators of a retirement plan that is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, are required to recognize an individual's waiver of her beneficiary interest under the plan is an issue of first impression in this Circuit, and there is a split among the courts of appeals that have considered the issue. The District Court below denied McGowan's motion for summary judgment and granted summary judgment in favor of NJNG. The court held that Plan administrators are not required to look beyond Plan documents to determine whether a waiver has been effectuated in a private agreement between the participant and his named beneficiary. For the reasons set forth below, we will affirm.[1]

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1. Although this Opinion represents the Opinion of the Court in affirming the lower court's decision, Judge Becker has declined to join in the reasoning contained in Part III.A.1, *infra*. *See* Concurring Op. at 22.

Appendix A

I. FACTUAL AND PROCEDURAL HISTORY

McGowan was employed by NJNG from May 12, 1969, until his retirement on November 30, 1996. As of the date of his retirement, McGowan was married to his second wife, Rosemary Byrne. Shortly before his retirement, McGowan elected to receive his retirement benefits in the form of an "automatic surviving spouse option," creating a 50% survivor annuity for Rosemary. This election remained in effect when he began receiving benefits in 1996.

McGowan and Rosemary were divorced in Palm Beach County, Florida, on May 24, 1999. On July 23, 1998, prior to the formal entry of the divorce, they entered into a Marital Settlement Agreement, which was later incorporated into the final judgment of dissolution. The agreement stated that Rosemary "waives any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Gas Company Employee Pension Plan of the Husband." (App. at A61.) Shortly after Rosemary signed this purported waiver, McGowan contacted the Plan to change the named survivor beneficiary. On July 27, 1998, Rosemary signed a form consenting to the election of McGowan's first wife, Shirley McGowan, as the replacement beneficiary.

In an August 6, 1998, letter, the Plan's benefits manager, Nancy Renner, informed McGowan that the Plan did not permit changes to his prior contingent beneficiary election once he started receiving benefit payments. Notwithstanding the Plan's denial of his initial request, McGowan sought to change beneficiaries again after his marriage to his current wife, Donna McGowan, on November 3, 2001. NJNG refused

to recognize McGowan's nomination of Donna as the new contingent beneficiary and maintained that Rosemary was still the beneficiary under the Plan.

On February 25, 2002, McGowan filed an appeal with the Plan, which was denied by the Plan Claims Administration Committee on April 30, 2002. McGowan subsequently exhausted all administrative appeals and commenced the present action with a two-count Complaint in the United States District Court for the District of New Jersey on March 5, 2003. In Count I, McGowan sought a declaration directing NJNG to recognize Rosemary's waiver and the subsequent nomination of Donna as the new beneficiary. In Count II, McGowan sought the imposition of civil penalties against NJNG for allegedly failing to produce Plan documents within the time period designated by ERISA at 29 U.S.C. § 1132(c).

In its July 26, 2004, Order and Opinion, the District Court denied McGowan's Motion for Summary Judgment and granted NJNG's Cross-Motion for Summary Judgment. Appellant filed a timely Notice of Appeal with this Court on August 23, 2004.

II. JURISDICTION AND STANDARDS OF REVIEW

NJNG's retirement plan is an "employee welfare benefit plan" within the meaning of ERISA, 29 U.S.C. § 1002(1). The District Court thus had federal question jurisdiction over the instant dispute pursuant to 28 U.S.C. § 1331. *See also* 29 U.S.C. § 1132(a)(1)(B) (a plan participant has the right to bring a civil action "to recover benefits due to him under

the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under terms of the plan"). Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over the District Court's final order ruling on the parties' cross-motions for summary judgment.

"The standard of review in an appeal from an order resolving cross-motions for summary judgment is plenary." *Cantor v. Perelman,* 414 F.3d 430, 434 n. 2 (3d Cir.2005) (citing *Int'l Union, United Mine Workers of Am. v. Racho Trucking Co.,* 897 F.2d 1248, 1252 (3d Cir.1990)). In reviewing the propriety of a summary judgment ruling, we apply the same standard that the District Court should have applied. *Bucks County Dep't of Mental Health/Mental Retardation v. Pennsylvania,* 379 F.3d 61, 65 (3d Cir.2004). Under Fed.R.Civ.P. 56(c), summary judgment should be granted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The material facts of this case are not in dispute, and the issue presented is purely legal: whether NJNG should be compelled to recognize Rosemary's waiver of her rights as a beneficiary under the Plan.

With respect to McGowan's claim that NJNG failed to provide Plan documents in a timely manner, we review the District Court's denial of civil penalties under 29 U.S.C. § 1132(c) for abuse of discretion. *See Bruch v. Firestone Tire & Rubber Co.,* 828 F.2d 134, 153 (3d Cir.1987), *rev'd in*

part on other grounds, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

III. DISCUSSION

A. *Waiver of Benefits Under ERISA*

As noted, there is a circuit split on the issue of whether administrators of an ERISA plan are required to recognize a beneficiary's waiver of his or her benefits. The majority of circuits that have addressed this issue have held that such waivers are valid under certain circumstances. *See, e.g., Altobelli v. Int'l Bus. Mach. Corp.,* 77 F.3d 78 (4th Cir.1996); *Mohamed v. Kerr,* 53 F.3d 911 (8th Cir.1995); *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321 (5th Cir.1994); *Metro. Life Ins. Co. v. Hanslip,* 939 F.2d 904 (10th Cir.1991); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275 (7th Cir.1990) (en banc). Only two courts of appeals have disagreed, holding that plan administrators need not look beyond the documents on file with the plan to determine whether there has been a valid waiver effectuated in outside private documents. *Krishna v. Colgate Palmolive Co.,* 7 F.3d 11 (2d Cir.1993); *McMillan v. Parrott,* 913 F.2d 310 (6th Cir.1990).[2]

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2. Although this is an issue of first impression in this Court, the District Court's decision in this case is the fourth time that a district court within this Circuit has addressed waivers under ERISA. Including decision below, two district court decisions in this Circuit have sided with the minority view, *see also Zienowicz v. Metro. Life. Ins. Co.,* 205 F.Supp.2d 339 (D.N.J.2002), and two others have applied the majority approach, *John Hancock Mut. Life Ins. Co. v. Timbo,* 67 F.Supp.2d 413 (D.N.J.1999); *Trustees of Iron Workers Local 451 Annuity Fund v. O'Brien,* 937 F.Supp. 346 (D.De.1996).

Appendix A

"ERISA is an intricate, comprehensive statute." *Boggs v. Boggs,* 520 U.S. 833, 841, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). It is so designed in order to protect "the interests of participants in employee benefit plans and their beneficiaries[.]" 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). The majority approach is largely based on the premise that, despite the comprehensive nature of the statute, there are "gaps" that may be filled by reliance on federal common law. *See, e.g., Altobelli,* 77 F.3d at 80; *Brandon,* 18 F.3d at 1325; *Fox Valley,* 897 F.2d at 278; *Lyman Lumber Co. v. Hill,* 877 F.2d 692, 693 (8th Cir.1989); *see also Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 n. 8 (3d Cir.1993) ("*Firestone* authorizes the federal courts to develop federal common law to fill gaps left by ERISA." (citing *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989))).

According to the majority approach, because ERISA does not explicitly address "waiver" by a beneficiary, we may turn to federal common law to determine whether, and under what circumstances, an individual may validly waive her benefits in an ERISA plan. *See Altobelli,* 77 F.3d at 81; *Brandon,* 18 F.3d at 1326; *Fox Valley,* 897 F.2d at 281; *Lyman Lumber,* 877 F.2d at 693. Under the federal common law that has developed, an individual's waiver is valid if, "upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest. . . ." *Clift v. Clift,* 210 F.3d 268, 271-72 (5th Cir.2000); *see also Mohamed,* 53 F.3d at 914-15 ("a property settlement agreement entered into pursuant to a dissolution may divest former spouses of beneficiary rights in each

other's [ERISA benefits], if the agreement makes it clear that the former spouses so intend."). Moreover, "any waiver must be voluntarily made in good faith." *Clift*, 210 F.3d at 272. We disagree with McGowan's argument that the situation presented by this case is not resolved by looking to the express terms of ERISA, and we therefore decline to follow the federal common law approach.

1. ERISA's Requirement that Plans Be Administered in Accordance with the Plan Documents

ERISA imposes a fiduciary duty on plan administrators to discharge their duties "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). As such, the statute dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties. *McMillan*, 913 F.2d at 311-12 ("This clear statutory command, together with the plan provisions, answer the question; the documents control. . . ."); *cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 150, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (noting "ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents.").

The Plan documents in this case designate Rosemary as the beneficiary, and any requirement imposed on Plan administrators to look beyond these documents would go against the specific command of § 1104(a)(1)(D). Because this case is resolved by reference to the terms of ERISA and the Plan documents alone, federal common law should simply have no place in our analysis.

Our holding is not only required by the terms of § 1104(a)(1)(D), but it is also necessary to promote one of the principal goals underlying ERISA—ensuring that "plans be uniform in their interpretation and simple in their application." *McMillan,* 913 F.2d at 312 (citing H.R.Rep. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650); *see also Krishna,* 7 F.3d at 16 (noting the "strong interest in uniform, uncomplicated administration of ERISA plans."). This extremely important policy goal is best served by the conclusion that, under § 1104(a)(1)(D), outside waivers are not binding on Plan administrators. *Cf. Fox Valley,* 897 F.2d at 284 (Ripple, J., dissenting) (noting that § 1104(a)(1)(D) "embodies a strong federal policy that all parties—participant, trustee, and beneficiary—be able to ascertain their rights and liabilities with certainty."). As Judge Wilkinson stated in his dissenting opinion in *Altobelli:*

> Strict adherence to § 1104(a)(1)(D) ensures that all interested parties, including participants, beneficiaries, and plan administrators, can identify their rights and duties with certainty, a primary objective of ERISA. This in turn limits costly disputes over the effect of outside documents on the distribution of plan benefits.

Altobelli, 77 F.3d at 82 (Wilkinson, C.J., dissenting) (internal citations omitted).

The Supreme Court similarly relied on the need for certainty and uniformity in the administration of ERISA plans when it held in *Egelhoff,* 532 U.S. at 148- 51, 121 S.Ct. 1322, that ERISA preempts a state statute whereby a former spouse's beneficiary designation was automatically revoked upon divorce. The Court also relied on "the congressional

goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators. . . ." *Id.* at 150, 121 S.Ct. 1322 (quoting *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)). The Court noted that, if ERISA did not preempt the state law at issue, a burden would be created for administrators to "familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been 'revoked' by operation of law" rather than "simply . . . identifying the beneficiary specified by the plan documents." *Id.* at 148-49, 121 S.Ct. 1322. These same concerns counsel against requiring administrators to familiarize themselves with the various private agreements that might exist between participants and beneficiaries to determine whether they contain valid waivers under federal common law.

My colleagues accept McGowan's assertion that requiring Plan administrators to recognize waivers does not in fact undermine certainty or uniformity, and that it would not create any administrative burden that is not already imposed by ERISA itself. McGowan points to 29 U.S.C. § 1056(d)(3), which allows the designation of an alternate payee by obtaining a qualified domestic relations order ("QDRO").[3] Administrators are already required to review domestic relations orders, such as divorce decrees and property settlement agreements,[4] to determine whether they

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3. All parties agree that the Florida state judgment of dissolution, which incorporated McGowan's Marital Settlement Agreement and Rosemary's waiver, does not qualify as a QDRO.

4. ERISA defines a "domestic relations order" as:

> [A]ny judgment, decree, or order (including approval of property settlement agreement) which—

(Cont'd)

are "qualified" under the requirements set forth in 29 U.S.C. §§ 1056(d)(3)(C) & (D). Thus, McGowan claims that the enforcement of waivers would place no burden on administrators that does not already exist. *Cf. Altobelli,* 77 F.3d at 81; *Fox Valley,* 897 F.2d at 282 ("No such additional burdens will be imposed. . . . Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant.").

I disagree. Sections 1056(d)(3)(C) & (D) provide very specific, objective elements that must be present for a domestic relations order to be "qualified." Thus, to determine if a document is a QDRO, administrators can essentially utilize a checklist and easily ascertain whether, for example, the document "specifies the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order," 29 U.S.C. § 1056(d)(3)(C)(i). Under the majority approach, on the other hand, administrators have to interpret documents that could otherwise be summarily discarded as non-QDROs, applying less concrete standards, to determine whether they were (1) voluntarily entered into, (2) in good faith, and (3) specific enough that a "reasonable person" would see them

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> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

29 U.S.C. § 1056(d)(3)(B)(ii).

as valid waivers. It cannot be denied that requiring administrators to review contractual language under an amorphous "reasonable person" standard will create a risk of litigation and administrative burdens beyond what is created by requiring them to review orders under the uncomplicated set of objective elements set forth in § 1056(d)(3).

Nevertheless, McGowan argues that there is no data suggesting that plans in jurisdictions that enforce waivers have actually experienced greater administrative burdens. On the contrary, we need look no further than Eighth Circuit precedent for evidence that the majority approach creates the prospect of extensive litigation that is not created under the QDRO provision. Since that court's ruling in *Lyman Lumber,* it has been faced with multiple cases involving the issue of whether particular divorce settlement agreements contained sufficiently specific language to constitute valid waivers under the federal common law. *See, e.g., Hill v. AT & T Corp.,* 125 F.3d 646, 649-50 (8th Cir.1997); *Nat'l Auto. Dealers & Assoc. Ret. Trust,* 89 F.3d 496, 501 (8th Cir.1996); *Mohamed,* 53 F.3d at 915. The fact that the Eighth Circuit has repeatedly re-visited this issue belies the notion that ERISA's goals of certainty, simplicity and uniformity can be achieved through the establishment of a uniform federal common law.

In sum, the express terms of ERISA, as well as the policies underlying the Act, require us to affirm the District Court. "Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol

essential under less-certain rules." *Fox Valley,* 897 F.2d at 283 (Easterbrook, J., dissenting). We recognize that our holding produces the somewhat strange result whereby Rosemary continues to enjoy the benefits of McGowan's survivor annuity, even after purportedly signing away her rights under the Plan. However, Congress has carefully laid out the requirements for designating (and changing) beneficiaries under ERISA plans and has specifically required benefits to be paid in accordance with plan documents. As such, our holding "is a decision already made by legislation." *Id.* at 284.

2. ERISA's Prohibition on the Alienation or Assignment of Benefits

Recognition of Rosemary's waiver in this case would also contravene ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1).[5] McGowan argues that "waiver" is a distinct

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5. Section 1056(d)(1) reads, in relevant part, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The Plan in this case states, in turn:

> No benefit payable under the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge, and any such action shall be void and of no effect; nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such benefit, except as specifically provided in the Plan.

(App. at A133.)

concept from "assignment" or "alienation" and that waiver is therefore not expressly prohibited by § 1056(d)(1). *Cf. Altobelli,* 77 F.3d at 81; *Brandon,* 18 F.3d at 1324; *Fox Valley,* 897 F.2d at 279. We agree as a general matter that "waiver" is not the same thing as assignment or alienation. Assignment or alienation involves an affirmative transfer of benefits to another person, whereas waiver usually involves only a refusal of benefits on the part of the individual slated to receive them. *Cf. Fox Valley,* 897 F.2d at 279.

That said, McGowan's argument on this point is similar to an argument rejected by the Supreme Court in *Boggs.* In that case, the Supreme Court reversed the Fifth Circuit's ruling that ERISA did not preempt a state law allowing a beneficiary to transfer her interests in her former spouse's pension plan by testamentary instrument. The court of appeals had addressed whether the testamentary transfer was prohibited by § 1056(d)(1) and attempted to distinguish that transfer from an "assignment or alienation":

> [Section 1056(d)(1)] was not intended to affect support obligations among the members of a family. Furthermore, a non-participant spouse's ownership of an interest in the participant spouse's retirement benefits involves neither an alienation nor an assignment. Under community property law, ownership vests immediately in the non-earning spouse, and no transaction is needed to convey ownership. Thus, no transaction prohibited by the ERISA spendthrift provision has occurred.

Boggs v. Boggs, 82 F.3d 90, 97 (5th Cir.1996), *rev'd,* 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45.

The Supreme Court disagreed, stating that the testamentary transfer at issue was indeed prohibited under § 1056(d)(1), as it fell within the regulatory definition of "assignment or alienation." *Boggs,* 520 U.S. at 851, 117 S.Ct. 1754 (quoting 26 C.F.R. § 1.401(a)-13(c)(1)(ii)). The regulation defines "assignment or alienation" as "[a]ny direct *or indirect* arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (emphasis added). *Boggs* thus demonstrates that actions which may be semantically distinguishable from "assignment or alienation" may nevertheless be prohibited by § 1056(d)(1).

Similarly, although the common definitions of "waiver" and "assignment" may diverge, McGowan seeks to use the concept of waiver in order to effectuate what is the functional equivalent of an assignment of benefits from his former wife to his current wife.[6] As Judge Easterbrook pointed out in his dissenting opinion in *Fox Valley,* a "waiver" in the ERISA context is not merely a refusal of benefits, but also functions as "an anticipatory gift, to whoever is next in line under the [Plan's] rules[.]" 897 F.2d at 282-83 (Easterbrook, J., dissenting). Rosemary's "waiver" here, if recognized, creates an "indirect arrangement" whereby the Plan benefits are transferred to Donna, who in turn gains an "interest

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6. McGowan is actually asking this Court to enforce two successive assignments—the first being the consent form that Rosemary signed in 1998 allowing Shirley, his first wife, to be named as beneficiary, and the second being his present action seeking to replace Shirley with Donna, his current wife.

enforceable against the plan." These actions therefore fit within the definition of "assignment or alienation" provided in 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Thus, even though ERISA does not expressly state that "waivers" are prohibited, recognition of the waiver sought in this case would undermine § 1056(d)(1).

Finally, it is worth noting that any concern for the ability of individuals to freely and voluntarily relinquish certain rights in their former spouses' ERISA plan benefits upon divorce has already been addressed by Congress through the passage of the QDRO provision in 1984. The Supreme Court in *Boggs* emphasized the care with which Congress created the QDRO mechanism in order "to give enhanced protection to the spouse and dependent children in the event of divorce or separation[.]" *Boggs,* 520 U.S. at 847, 117 S.Ct. 1754. The Court also made clear that the QDRO exception to § 1056(d)(1) is to be narrowly construed and is "not subject to judicial expansion." *Id.* at 851, 117 S.Ct. 1754. As such, recognition of additional methods of dispersing ERISA benefits in the event of a divorce would be inconsistent with this comprehensive scheme.

> The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are *not consistent with the statutory scheme.* ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist.

Id. at 847-48, 117 S.Ct. 1754 (emphasis added) (citing *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 147-48, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)).

Applying this reasoning to the case at hand, ERISA's silence with respect to the right to waive benefits supports the conclusion that such a right does not exist. The comprehensive nature of the QDRO provision suggests that Congress provided only one option to individuals in McGowan's position. In other words, the QDRO provision, which recognizes the right to designate alternate payees under certain circumstances, "give[s] rise to the strong implication that" the designation of alternate payees under other circumstances (i.e. through waivers) is "not consistent with the statutory scheme," *Id.*

In sum, McGowan was required to satisfy the very specific requirements of § 1056(d)(3) in order to change beneficiaries, and he has provided no reason why he could not have obtained a QDRO from the Florida state courts effectuating Rosemary's intent to be removed as the beneficiary under the Plan at the time of the divorce. He should not now be able to circumvent the requirements of § 1056(d)(3), as well as the requirements of § 1104(a)(1)(D), by couching this change of beneficiaries in "waiver" terms.

B. *Civil Penalties Under 29 U.S.C. § 1132(c)*

Count II of McGowan's Complaint alleged that NJNG violated ERISA by failing to furnish requested Plan documents within 30 days of his initial request and sought civil penalties under 29 U.S.C. § 1132(c). NJNG concedes

that McGowan's attorney made an initial request for copies of relevant Plan documents on June 19, 2002. NJNG also concedes that the company failed to comply with this request until October 28, 2002 (five days after McGowan's attorney made a second request). NJNG argues, however, that they were acting under a good faith (but mistaken) belief that the June 19th letter did not put them on notice of McGowan's request for documents.

Section 1132(c) grants the District Court broad discretion in deciding whether to impose civil penalties for delayed discovery. *Bruch,* 828 F.2d at 153. This Court has held that a district court "would be well within its discretion in setting damages at $0" if, for example, "the employee's claim for benefits is not colorable, and if the employer displayed no bad faith in responding to the claim. . . ." *Id.* Here, the District Court based its decision to set damages at zero on the determination that NJNG did not act in bad faith. Even though the District Court held that the June 19th letter, when objectively viewed, was a valid request under § 1132(c), the court determined that NJNG was under a subjective good faith belief that they did not yet have to furnish the requested documents. Nothing has been presented to this Court which would cause us to question the District Court's conclusion that the NJNG did not act in bad faith. We therefore find no abuse of discretion on the part of the District Court in this case.

IV. CONCLUSION

For the foregoing reasons, we will affirm the July 26, 2004, Order and Opinion of the District Court denying McGowan's Motion for Summary Judgment and granting summary judgment in favor of NJNG.

Appendix A

McGowan v. NJR Service Corporation; New Jersey Natural Gas Company, No. 04-3620

BECKER, Circuit Judge, concurring.

I agree with the result reached in Part III.A of Judge Van Antwerpen's opinion, which holds that we should embrace the "minority rule," thus rendering ineffective Rosemary's purported waiver of her rights as beneficiary and McGowan's subsequent nomination of his present wife, Donna, as the new beneficiary. I also agree with Judge Van Antwerpen's disposition, in Part III.B, of the civil penalties issue. As the foregoing suggests, I join in the judgment affirming the District Court.

Judge Van Antwerpen relies on three theories to support his conclusion that Rosemary's waiver is ineffective. First, he reasons that, because the Plan documents in this case designate Rosemary as the beneficiary, any requirement imposed on Plan administrators to look beyond these documents would violate the specific command of 29 U.S.C. § 1104(a)(1)(D). Second, and relatedly, he argues that this holding is necessary to promote one of the principal goals underlying ERISA—ensuring that "plans be uniform in their interpretation and simple in their application." *McMillan v. Parrott,* 913 F.2d 310, 312 (6th Cir.1990). Third, he points out that recognition of Rosemary's waiver in this case would contravene ERISA's prohibition of assignment or alienation of benefits under 29 U.S.C. § 1056(d)(1). I write separately to explain why I disagree with the first and second justifications, and thus do not join Part III.A.1. I agree with the third justification, and thus join Part III.A.2. However,

since Judge Van Antwerpen's discussion of that point is brief, I think it useful to expand upon it, and begin with that issue.

I.

The anti-alienation or spendthrift provision, 29 U.S.C. § 1056(d), provides:

> Assignment or alienation of plan benefits
>
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

As Judge Van Antwerpen notes, "assignment" or "alienation" is defined by regulation to include:

> Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. 1.401(a)-13(c)(1)(ii).[7] Under this definition, I think that the purported waiver in this case was clearly a prohibited assignment or alienation. Rosemary's waiver was more than a renunciation of her right to benefits under the plan; rather,

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7. Neither party has challenged the validity of this definition, and the Supreme Court's reliance on it in *Boggs v. Boggs*, 520 U.S. 833, 851, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), suggests that we owe it deference.

it was an attempt to transfer her interest in the plan to McGowan, with the expectation that he would then be permitted to assign that interest to someone else, as he in fact attempted to do on two separate occasions. I see nothing in the anti-alienation provision that excepts transfers from plan beneficiaries to plan participants, particularly when the plan participant then seeks to transfer that interest to a third party. The purported waiver in this case fits squarely within the definition of assignment or alienation as an "indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan."

In this context, it is also useful to reference the QDRO provisions, for they shed additional light upon the subject. Congress added the QDRO provisions at the same time it required plans to offer benefits in the form of qualified joint and survivor annuities. *See* Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1426 (1984). I believe that Congress saw QDROs as the only means by which a participant or beneficiary could assign or alienate his or her interest in the plan.[8] This is confirmed by the language from

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8. While I join in Part III.A.2 of the majority opinion, believing that Judge Van Antwerpen correctly interprets the Supreme Court's discussion of the QDRO provision in *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), I feel constrained to note that the Supreme Court's congressional silence jurisprudence is somewhat of a patchwork. To be sure, a number of cases use silence as evidence of legislative intent, *see, e.g., Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 632-33, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983); *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n. 7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). However, Justice Scalia

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the 1984 Senate Report noting that, absent a QDRO, the participant's first spouse is still entitled to benefits upon the participant's death.[9] Since the waiver at issue in this case

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dissented in Johnson, delivering a critique of the majority's discussion of silence. First, Justice Scalia argued that the assumption that Congress's failure to amend a statute demonstrates that a prior judicial interpretation of the statute is correct should be abandoned because "[i]t is based . . . on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Id.* at 671, 107 S.Ct. 1442 (Scalia, J., dissenting). Justice Scalia also argued that it is impossible to determine whether congressional silence demonstrates "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Id.* at 672, 107 S.Ct. 1442.

Moreover, a number of cases have rejected silence as evidence of legislative intent. *See e.g. Fogerty v. Fantasy, Inc.* 510 U.S. 517, 527-33, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994); *Borough of Ridgefield v. New York Susquehanna & Western Railroad,* 810 F.2d 57, 60 (3d Cir.1987).

9. The Report stated:

> The bill provides that a qualified joint and survivor annuity is not required to be provided by a plan unless the participant and spouse have been married throughout the one-year period ending on the earlier of (1) the participant's annuity starting date (the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or disability)), or (2) the date of the participant's death. *If a participant dies*

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was not a QDRO, it is prohibited by ERISA's anti-alienation clause.

Nevertheless, some courts have concluded that the anti-alienation clause was intended solely to prevent the participant from alienating his or her benefits and should not act to prevent a secondary beneficiary from alienating his or her rights. For instance, Judge Harlington Wood, Jr., speaking for the full Court of Appeals for the Seventh Circuit, stated:

> The spendthrift provisions of ERISA are designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. These provisions focus on the assignment or alienation of benefits by a participant, not the waiver of a

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> *after the annuity starting date, the spouse to whom the participant was married during the one-year period ending on the annuity starting date is entitled to the survivor annuity under the plan whether or not the participant and spouse are married on the date of the participant's death.* The rule does not apply, however, if a qualified domestic relations orders . . . otherwise provides for the division for payment of the participant's retirement benefits. *For example, a qualified domestic relations order could provide that the former spouse is not entitled to any survivor benefits under the plan.*

S. Rep. No. 98-575, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2561-62 (emphasis added).

> right to payment of benefits made by a designated beneficiary.

Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 279 (7th Cir.1990) (en banc) (citation omitted); *see also Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78, 81 (4th Cir.1996) ("We agree with the Seventh Circuit that the anti-alienation clause does not apply to a beneficiary's waiver.").

This approach is not without appeal. It does seem untoward that McGowan should not be able to have his pension awarded to his present wife, rather than to a woman from whom he is long divorced. The anti-alienation clause, however, does not distinguish between benefits provided to participants and those provided to secondary beneficiaries; rather, it simply states that "benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Additionally, while the legislative history supports the view that the purpose of the clause was to prohibit a spendthrift from unwisely selling his or her interests in a plan, there is no reason why this focus of this concern should be limited to plan *participants*. If, hypothetically, McGowan were still married to Rosemary, but she wanted to sell her rights under the plan, I believe that most courts would find such a sale to be prohibited. This view finds support in Judge Easterbrook's dissenting opinion in *Fox Valley*:

> Although the majority holds that this rule applies only to "participants" in a pension plan as 29 U.S.C. § 1002(7) defines that term, it is not so limited. Section 1056(d)(1) bars the assignment

> of "benefits"—that is, payments under the plan—without regard to the identity of the person making that assignment. Section 1056(d)(2) reinforces this in saying that "a loan made to a participant or beneficiary shall not be treated as an assignment or alienation", an exemption unnecessary if the anti-alienation clause does not apply to beneficiaries in the first place. So Laurine could not have transferred the money to Dessie in exchange for a sofa—at least, Dessie could not have enforced the promise by attaching the benefits as they came in. Why, then, should Laurine be allowed to transfer the money to Dessie without getting a sofa?

897 F.2d at 283 (Easterbrook, J., dissenting).

In view of the foregoing, I do not see how the fact that McGowan and Rosemary are divorced changes this analysis. Since the waiver in this case occurred in the context of a divorce settlement, it would not be unreasonable to assume that Rosemary received something—perhaps not a sofa, but probably a greater share of some other portion of McGowan's assets—in return for her agreement to waive her interest in McGowan's pension plan. While Congress may have only intended to bar the "unwise" alienation of benefits, the plain language of the anti-alienation clause prohibits us from inquiring into the wisdom of a beneficiary's decision to transfer her interest to someone else.

Finally, as Judge Van Antwerpen correctly notes, this interpretation finds further support in *Boggs*. In that case,

the Court held that the anti-alienation clause preempted a state law permitting a testamentary transfer by a plan beneficiary. *See* 520 U.S. at 851, 117 S.Ct. 1754. At the very least, *Boggs* stands for the proposition that the anti-alienation clause applies equally to beneficiaries and participants, and thus it implicitly rejects the reasoning relied on by the Seventh Circuit in *Fox Valley.*

For all these reasons, I agree with Judge Van Antwerpen that the anti- alienation clause prohibits Rosemary's waiver.

II.

A.

Most courts adopting the minority rule have not relied on ERISA's anti-alienation clause; rather, like Judge Van Antwerpen, they have looked to 29 U.S.C. § 1104(a)(1). That section provides:

> . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Judge Van Antwerpen concludes that this provision "dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties." *See* Maj. Op. at 9. I am not persuaded that this is the case. In my view, § 1104(a)(1)(D) simply embodies the common-sense notion that a plan administrator should not take actions that are inconsistent with the plan's guidelines. Nothing in the language prohibits the administrator from consulting other documents, insofar as those documents do not conflict with the language of the plan. Indeed, an administrator must consult other documents to determine whether a participant has obtained a valid QDRO.

In this regard, it is important to note that the provision authorizing QDROs explicitly states that such orders are exempt from ERISA's anti-alienation clause but says nothing whatsoever about § 1104(a)(1)(D). This suggests that Congress simply did not see a conflict between the requirement that plan administrators perform their duties "in accordance with the documents and instruments governing the plan" and the requirement that they give effect to a transfer of benefits pursuant to a QDRO, underscoring my view that the real obstacle to the waiver in this case is the anti-alienation clause, not § 1104(a)(1)(D).

The plan documents in this case do not explicitly prohibit waivers of the sort Rosemary sought to execute.[10] Rather,

10. The applicable provision reads:

> The Participant may exercise his right to elect an optional form of benefit at any time during the election period

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the documents mirror the statutory language regarding the ability of a participant to waive the qualified joint and survivor annuity provided his spouse consents and does so prior to the date the spouse begins receiving benefits. Thus, the Plan documents do not prohibit waivers of the sort at issue here.

B.

Judge Van Antwerpen also argues, in accord with many of the courts that have adopted the minority rule, that concerns of efficiency and uniformity justify refusing to permit a beneficiary to waive her right to benefits. I am not persuaded by this argument. While Congress clearly intended to promote the uniform and efficient operation of plans, I agree with McGowan that the increased burden on the plan in this case would be minimal, particularly in light of the fact that plan administrators must already review external documents to determine whether they qualify as QDROs.

Judge Van Antwerpen argues that it is inherently easier for plan administrators to evaluate purported QDROs, because the statutory authorization for such agreements

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> specific in paragrapn (b) below; provided, however, that such election . . . shall be effective only if made in writing on a form provided by the Committee for that purpose, signed by the Participant and delivered to the Committee during the election period. Such election form shall provide for the Participant to certify (i) that he revokes the automatic surviving spouse option or (ii) that he elects to be covered under such option. . . .

provides specific criteria for doing so. But I see nothing that would prohibit us from using our authority to fashion federal common law in this area to develop similarly clear criteria for evaluating purported waivers.

In addition, as both parties acknowledge, plan administrators would need to make further actuarial calculations when a beneficiary waives her right to benefits. But administrators already need to make such calculations in the context of QDROs, and indeed in most cases of this genre. These kinds of calculations are *de rigeur* for plan administrators; it is the "stuff" of their work. Thus, while there would be some additional burden, I do not think it is nearly as great as Judge Van Antwerpen suggests.

III.

For the above reasons, while I do not agree with some of the justifications offered in Judge Van Antwerpen's opinion, I concur in the result and in the judgment. The plain language of ERISA prohibits waivers of the type at issue here, so we have no choice but to affirm the decision of the District Court.

Appendix A

McGowan v. NJR Service Corporation; New Jersey Natural Gas Company, No. 04-3620

FUENTES, Circuit Judge, dissenting.

I disagree with the result reached by Judge Van Antwerpen and Judge Becker, that, although Rosemary knowingly and voluntarily signed a waiver of her pension benefits, in accordance with a negotiated and court-approved divorce settlement, the waiver is not permitted under ERISA. The primary question here is whether Rosemary may waive her pension benefits despite ERISA's anti-alienation provision, which bars alienation or assignment of pension benefits absent a particular order not present here. This question is the subject of a long-standing "circuit split," the minority position of which is adopted by my colleagues today.

Because I believe that both ERISA and the Plan are silent on the enforceability of waivers of benefits (as waivers are neither alienations nor assignments), and that federal common law ought to fill this gap by respecting the time-honored principle of state autonomy in the domestic law area, I would allow waivers of sufficient specificity to be given effect. I therefore respectfully dissent.[11]

A. ***ERISA's Anti-Alienation Clause***

My colleagues agree that ERISA's anti-alienation (or "spendthrift") clause, 29 U.S.C. § 1056(d), bars the waiver in this case. I, however, agree with the Courts of Appeals that have found that the anti-alienation provision does not

11. I join Judge Van Antwerpen's opinion as to Part III.B.

address waivers. *See, e.g., Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78, 81 (4th Cir.1996); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir.1990) (en banc); *cf. Metro. Life Ins. Co. v. Hanslip*, 939 F.2d 904, 907 (10th Cir.1991) (noting that an "applicable divorce decree" may change a beneficiary designation); *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir.1989) (finding that no provision of ERISA addresses waiver).[12] ERISA is a detailed and carefully worded statute, and I am wary of expanding the prohibitions in § 1056(d) beyond those specifically enumerated by Congress. *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) ("[W]e have noted that ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.") (internal quotations omitted).

As my colleagues recognize, absent a Qualified Domestic Relations Order ("QDRO"), the anti-alienation clause bars only assignments and alienations of benefits; it makes no reference to waivers. An "alienation" is a *"[c]onveyance* or *transfer* of property to another." Black's Law Dictionary 73

12. I find it immaterial that the waiver here took place after McGowan's retirement. *But see Anderson v. Marshall*, 856 F.Supp. 604, 607 (D.Kan.1994). The Plan here does contain an anti-revocation provision, modeled after 29 U.S.C. § 1055(c), which bars revocation of the pension benefit involved here after retirement. However, a revocation (with consent) of one's election to a benefit is materially different from a waiver of benefits by a vested beneficiary, as the language of § 1055(c) appears to be a limitation only on the *participant's* actions, rather than on the beneficiary's actions.

(7th ed.1999) (emphases added). "Assignment" is defined as "the *transfer* of rights or property." *Id.* at 115 (emphasis added); *see also id.* ("'An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another. . . .'") (quoting Alexander M. Burrill, *A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* § 1, at 1 (James Avery Webb 6th ed. 1894)). In contrast, "waiver" is defined as "[t]he voluntary relinquishment or abandonment-express or implied-of a legal right or advantage." *Id.* at 1574. Waiver does not involve a transfer of rights; it is merely a relinquishment. Congress understands this distinction between a waiver and an assignment, *see* 5 U.S.C. § 8465,[13] and chose only to prohibit the latter (along with alienations) in the anti-alienation provision of ERISA.

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13. Section 8465, which governs the Federal Employees' Retirement System and is entitled "Waiver, allotment, and assignment of benefits," reads:

> (a) An individual entitled to an annuity payable from the Fund may decline to accept all or any part of the amount of the annuity by a *waiver* signed and filed with the Office. The *waiver* may be revoked in writing at any time. Payment of the annuity *waived* may not be made for the period during which the *waiver* is in effect.
>
> (b) An individual entitled to an annuity payable from the Fund may make allotments or *assignments* of amounts from the annuity for such purposes as the Office considers appropriate.

§ 8465 (emphases added).

I find the distinction between waiver and assignment or alienation to be a significant one. The anti-alienation provision serves specific purposes. It prevents spouses who have been given rights and benefits under a plan from unwisely squandering those rights. For example, it safeguards against unscrupulous predators preying upon participants and beneficiaries by offering inadequate immediate gratification in exchange for the long-term benefits ERISA is designed to guarantee. *See Coar v. Kazimir,* 990 F.2d 1413, 1420 (3d Cir.1993)[14] (noting that the legislative history of the anti-alienation provision suggests that it was "intended to protect plan beneficiaries by ensuring that plan assets are used only for payment of benefits") (internal quotation omitted). These concerns are not nearly as strong with respect to waiver, as waiver is not likely to be induced by an offer from an unscrupulous, predatory character. Only the participant would derive benefits from a waiver (as one cannot waive rights to a third party), whereas anyone could pay a beneficiary for an assignment or alienation. Another concern animating the anti-alienation provision is creditor's access to benefits, which is notably absent here.[15] *See Coar,*

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14. Similar to the set-off in *Coar,* the waiver here is conceptually distinct from assignment and alienation. Accordingly, our comment that "inasmuch as a set-off is not an alienation, then the absence of an exception allowing a set-off to the restraint on alienation is meaningless" applies with equal force here. *Coar,* 990 F.2d at 1424.

15. We also noted in *Coar* that the legislative history of the provision speaks of "a garnishment or levy" and that the there are remarks in the history that term it an "anti-garnishment provision." 990 F.2d at 1420-21. Congress's concern regarding this sort of involuntary alienation further underscores my belief that it was not targeting knowing and voluntary waivers when drafting the provision.

990 F.2d at 1420-21 (noting that "we do not believe that Congress intended the anti-alienation provision to dilute the potential relief available to pension beneficiaries. Instead, we read section 206(d)(1) and, by extension [*Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990)], as shielding only the beneficiaries' interest under the pension plan from third-party creditors.").

Both of my colleagues find much import in 26 C.F.R. § 1.401(a)- 13(c)(1)(ii), a regulation promulgated by the Internal Revenue Service concerning the anti-alienation provision. The regulation interprets the statute as covering "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan." *Id.* As noted by my colleagues, allowing McGowan's subsequent and independent attempt to nominate Donna appears to transform Rosemary's waiver into an indirect assignment, as described by 26 C.F.R. § 1.401(a)-13(c)(1)(ii). However, such a reading allows third-party actions to invalidate what would otherwise be valid waivers. Indeed, the majority would appear to prohibit all waivers, even though in many cases, there will be no "renomination" at issue. The majority's argument also puts the cart before the horse, inasmuch as it presupposes that the Plan must give effect to McGowan's renomination of Donna. Were the combination of the waiver and the nomination to create a prohibited indirect assignment, only the latter action should be invalidated, as it is that action that creates the problematic

arrangement.[16] Conceiving of the waiver as an acquisition of rights by McGowan himself is also untenable, as he would not get rights to the benefit involved here (a survivor annuity) if the waiver is given effect. Instead, the right to the annuity would be destroyed by the waiver.

In *Boggs v. Boggs*, the Supreme Court "consider[ed] whether [ERISA] pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits." 520 U.S. 833, 835-36, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). The Court addressed whether state community property law was preempted by ERISA, and the Court rejected the argument that ERISA simply did not speak to the issue. It found that it could "begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects" and held "that there is a conflict, which suffices to resolve the case." *Id.* at 841, 117 S.Ct. 1754. All of the cases considering *Boggs'* s effect on waivers of the sort considered here recognize that ERISA broadly preempts state law, and go on to find that the federal

16. Although I would have remanded the question whether the renomination of Donna for the annuity option should be given effect, I note that there are good reasons not to honor it. If no renomination is allowed, waiver could only occur once, so there would be no danger of repeated divorces causing high administrative costs based on the need to do several actuarial recalculations. However, this is not to say that Donna would be without protection, as the waiver would likely result in the lump-sum death benefit under Section 6.2 of the Plan (as opposed to the survivor annuity under Option B of Section 8.2) going into effect, as the annuity option would then not be effective. Indeed, McGowan could change beneficiaries for the lump-sum benefit freely under Section 5.3.

common law approach is not in conflict with the holding of *Boggs*. *See, e.g., Manning v. Hayes,* 212 F.3d 866, 873 (5th Cir.2000) (holding that *Boggs* does not cast doubt on *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321 (5th Cir.1994)); *Metro. Life Ins. Co. v. Pettit,* 164 F.3d 857, 864 (4th Cir.1998) (reaffirming *Altobelli* after *Boggs*). Importantly, when discussing the surviving spouse annuity (which is the benefit here), the *Boggs* Court noted that the wife "has not waived her right to the survivor's annuity." 520 U.S. at 842, 117 S.Ct. 1754. Also, the Court, noted that the "anti-alienation provision can 'be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.'" *Id.* at 851, 117 S.Ct. 1754 (quoting J. Langbein & B. Wolk, Pension and Employee Benefit Law 547 (2d ed.1995)). Here, Rosemary's waiver occurred after McGowan's retirement.

However, some of the language in *Boggs* may cast doubt on the policies behind the majority rule. The Court stated that the "principal object [of ERISA] is to protect plan participants *and beneficiaries." Id.* at 845, 117 S.Ct. 1754 (emphasis added). This language seems to conflict with the language in the *Fox Valley* majority opinion discussing how the QDRO provision is meant to protect participants, not beneficiaries. *Compare id.* at 847, 117 S.Ct. 1754 ("In creating the QDRO mechanism Congress was careful to provide that the alternate payee, the 'spouse, former spouse, child, or other dependent of a participant,' is to be considered a plan beneficiary.") (quoting §§ 1056(d)(3)(K) & (J)), *with Fox Valley,* 897 F.2d at 279 (noting that the anti-alienation provision "focus[es] on the assignment or alienation of benefits by a participant, not the waiver of a right to payment

of benefits made by a designated beneficiary"). Similarly, the Court noted that "[t]he QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income." *Id.* at 854, 117 S.Ct. 1754; *see also id.* at 853, 117 S.Ct. 1754 ("Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to an annuity."). I agree with my colleagues that *Boggs* makes clear that the anti-alienation clause provides a restraint on actions by both participants and beneficiaries. However, that does not change my view that the provision does not speak to waivers.

Given the silence of the anti-alienation provision on the issue of waiver, I find it inapplicable here. I agree with Judge Becker, for the reasons he states, that the fiduciary duty provision of ERISA, 29 U.S.C. § 1104(a)(1)(D), is of no import here.[17] Because the QDRO exception applies only to assignments and alienations, it is also irrelevant to this case. *See Fox Valley,* 897 F.2d at 279 ("The QDRO requirements specify the procedures necessary to assign benefits, but those procedures need not be followed when a nonparticipant is

17. I note also that Judge Van Antwerpen's opinion reads this provision as allowing all documents *filed with* the Plan to govern its administration, including forms filed to designate beneficiaries. However, although I need not resolve this issue because this case is ultimately decided only on the anti-alienation provision, I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan. *Cf. McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees,* 340 F.3d 139, 143-44 (3d Cir.2003) ("Clearly, the 'documents and instruments governing the plan' do not necessarily include all relevant documents and, in particular, do not necessarily include the plaintiff's claim file.").

waiving an interest in pension benefits. ERISA allows beneficiaries to waive their interests in benefits.").

In accord with the majority of the courts of appeals that have faced the issue, given the comprehensive nature of ERISA, its broad preemptive scope, and its goal of uniformity in the law of employee benefit plans, I believe that ERISA's silence on waiver should be filled by federal common law. *See McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.*, 124 F.3d 471, 481 (3d Cir.1997) ("'[W]here state law is preempted and no specific federal provision governs, a court is forced to make law or leave a void where neither state nor federal law applies. In such a situation it is a reasonable inference that Congress intended some law, and therefore federal law, to apply.'") (quoting *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 426 F.Supp. 316, 322 (N.D.Ind. 1977)); *see also Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 n. 8 (3d Cir.1993) ("[*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)] authorizes the federal courts to develop federal common law to fill gaps left by ERISA.").

B. *Federal Common Law*

My conclusion that federal common law should fill the gap in ERISA concerning the enforceability of waivers does not end the inquiry, as it must be determined whether, and in what instances, federal common law should recognize waivers. Allowing waiver fulfills the intent of the parties to a divorce, allows spouses broader room to negotiate during the settlement of property attendant to divorce, and comports with longstanding common law domestic relations rules. The

Fox Valley majority reasoned that, because ERISA does not prohibit or preempt a waiver and because enforcement will not create an undue burden for plan administrators, a proper waiver should be given effect. 897 F.2d at 279-80; *see also Altobelli,* 77 F.3d at 81-82.

I agree with Judge Becker that the enforcement of waivers would not lead to disuniformity and complexity in the administration of ERISA plans. The *Fox Valley* court also disagreed with the suggestion that its "decision imposes burdensome obligations on plan administrators," stating that "[n]o such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits." 879 F.2d at 282. The Fifth Circuit has also discussed the "long and venerable history" of "[f]ederal respect for state domestic relations law" in support of the federal common law approach. *Brandon,* 18 F.3d at 1326 (quoting *De Sylva v. Ballentine,* 351 U.S. 570, 580, 76 S.Ct. 974, 100 L.Ed. 1415 (1956) (citations omitted)). I find the reasoning of the *Fox Valley* and *Brandon* courts to be compelling.

Although I find that federal policy favors giving effect to waivers, it is still unclear whether federal common law should (1) *allow* waivers to be given effect if the plan provisions do not specifically prohibit it or (2) *mandate* that waivers be given effect notwithstanding any plan provisions to the contrary. Although the former option may be more in line with § 1104(a)(1)(D) (the fiduciary duty provision), the better option is the latter, which promotes uniformity and

certainty in plan administration. However, given that the Plan here is silent on waiver, this case does not mandate resolution of this issue, as Rosemary's waiver should be given effect under either approach.

Although in some cases there may be a dispute over whether particular language in a divorce settlement is specific and definite enough to constitute waiver of a pension benefit, there is no serious dispute here as to whether Rosemary's waiver was insufficient. It clearly identified the Plan and waives all rights to benefits under the Plan. Accordingly, I would give effect to Rosemary's waiver.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY DATED JULY 23, 2004

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler, U.S.D.J.
Civ. A. No. 03-1035 (SRC)

JAMES M. MCGOWAN, Sr.,

Plaintiff,

v.

NEW JERSEY NATURAL GAS COMPANY,

Defendant.

OPINION

CHESLER, *District Judge*

This matter comes before the Court upon the motion by plaintiff James M. McGowan, Sr. for summary judgment pursuant to Federal Rule of Civil Procedure 56 and defendant New Jersey Natural Gas Company's cross-motion for summary judgment. For the reasons set forth below, the Court will deny plaintiff's motion and grant defendant's cross-motion.

Appendix B

FACTS AND PROCEDURAL HISTORY

From May 12, 1969, to November 30, 1996, defendant New Jersey Natural Gas Company ("defendant" or "NJNG") employed plaintiff James M. McGowan, Sr. During that time, plaintiff accrued benefits under the New Jersey Natural Gas Company Plan for Retirement Allowances for Non-Represented Employees (the "NJNG Plan"). While plaintiff was employed by defendant, he married Rosemary Byrne ("Rosemary"). Plaintiff's marriage to Rosemary lasted approximately two years. On August 1, 1996, plaintiff completed a beneficiary designation form for the Plan, wherein he designated Rosemary as his beneficiary under the Plan. On October 16, 1996, plaintiff executed a Plan election form wherein he elected to receive his retirement benefit under the Plan in the form of an "automatic surviving spouse option," an annuity for his life, with a 50% survivor annuity payable to his spouse, then Rosemary. On November 30, 1996, plaintiff retired and commenced receiving benefits under the Plan.

In July 1998, plaintiff contacted defendant's benefits and compensation department inquiring whether he could change his beneficiary under the Plan. Defendant informed plaintiff that according to the Summary Plan Description, a participant could not name a new contingent participant, *i.e.*, a new beneficiary, after benefit payments commenced. In other words, once plaintiff began receiving benefits pursuant to the Plan, the Plan could not be altered in any way.

Plaintiff and Rosemary's marriage was dissolved in Palm Beach County, Florida on May 24, 1999. Prior to the final

judgment, plaintiff and Rosemary entered into a Marital Settlement Agreement dated July 23, 1998. That agreement was made part of and incorporated into the final Judgment of Dissolution. In the agreement, Rosemary "waived all rights, title, interest, and/or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Gas Company Employee Pension Plan of the husband." *See* Affidavit of Hugo C. Bottino at Exhibit F, ¶ 8(d). ("Bottino Aff. at Ex."). On July 27, 1998, Rosemary executed a document wherein she consented to the naming of Shirley McGowan, plaintiff's first wife, as plaintiff's beneficiary under the plan. Plaintiff then requested by letter that defendant alter his beneficiary designation under the plan from Rosemary to Shirley McGowan. Defendant denied the request.

On November 3, 2001, Plaintiff married his current wife, Donna McGowan ("Donna"). Thereafter, plaintiff sought to nominate Donna as the contingent beneficiary of plaintiff's joint and 50% survivorship annuity under the Plan. However, defendant refused to honor plaintiff's nomination of Donna as the contingent beneficiary of his pension benefit plan upon his death. On February 25, 2002, plaintiff appealed defendant's determination that Donna could not be nominated as the rightful contingent beneficiary under the NJNG Plan. On April 30, 2002, defendant denied plaintiff's appeal. Subsequently, plaintiff exhausted all internal and administrative appeals to nominate Donna as contingent beneficiary of his benefits under the NJNG Plan.

On March 5, 2003, Plaintiff commenced this action by filing a two-count Complaint against NJR Service

Corporation. Plaintiff amended the Complaint on July 9, 2003, correctly naming NJNG as defendant. Count I of the Amended Complaint seeks declaratory relief against defendant, directing defendant to designate Donna as his contingent beneficiary under the NJNG Plan. Count II seeks civil penalties against defendant for failure to provide plan documents to plaintiff.

On January 29, 2004, plaintiff filed a motion for summary judgment as to all Counts of the Amended Complaint. Defendant cross-moved for summary judgment on February 17, 2004. The court heard oral argument in this matter on May 25, 2004.

DISCUSSION

A. *Summary Judgment*

Federal Rule of Civil Procedure 56 provides that a party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Serbin v. Bora Corp.,* 96 F.3d 66, 69 n.2 (3d Cir. 1996). An issue of fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In determining whether any genuine issue of material fact exists, "all inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party." *Pipko v. C.I.A.,* 312 F. Supp. 2d 669, 674 (D.N.J. 2004) (citing *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.,* 264 F.3d 302, 305-06 (3d

Cir. 2001)). The party moving for summary judgment bears the burden of offering evidence demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party can fulfill that requirement, the burden shifts to the nonmoving party to present evidence indicating a genuine issue of material fact. *Id.* at 324.

B. *ERISA and Waiver*

The issue to be resolved here is whether an ERISA pension benefit plan participant receiving benefits, whose plan does not permit a change of beneficiaries once benefits have commenced, may change the designated beneficiary in his plan from the participant's ex-wife to his current wife without a valid Qualified Domestic Relations Order ("QDRO"). In light of the record in this case, the Court finds that the significant legislative intent in maintaining the uniform and simple administration of ERISA benefit plans necessitates that plaintiff cannot alter the beneficiary of his pension plan unless done so in accordance with the express provisions of the benefit plan.

The employee benefit plan at issue here, the New Jersey Natural Gas Company Plan for Retirement Allowances for Non-Represented Employees, is an employee pension benefit plan within the meaning of ERISA. *See* 29 U.S.C. § 1002(2)(A). In enacting the statute, Congress mandated that ERISA "shall supersede and all State laws insofar as they may now and hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Accordingly, courts must rely on ERISA itself or, in circumstances in which the statute is silent, federal common law in determining issues relating to

employee benefit plans, including the one implicated in this case. *See Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 n.8 (3d Cir. 1993).

Courts deciding the threshold question to be resolved here, *i.e.*, whether a beneficiary of an ERISA benefit plan can waive her rights in an external document,[1] have reached opposing outcomes. A majority of Circuits have upheld "specific waivers of benefits from ERISA plans in divorce settlements by asserting federal common law." *Estate of Zienowicz v. Metropolitan Life Ins. Co.*, 205 F. Supp. 2d 339 (D.N.J. 2002) (citing *Estate of Altobelli v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 80-82 (4th Cir. 1996)); *Mohamed v. Kerr*, 53 F.3d 911, 9147 (8th Cir. 1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 3126 (5th Cir. 1994); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir. 1990) (en banc); *see also Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 907 (10th Cir. 1991).

The United States Court of Appeals for the Fourth Circuit succinctly set forth the majority view in *Altobelli:*

> We also agree that giving effect to a waiver contained in a domestic relations order does not burden plan administrators in a manner violative of ERISA. ERISA was designed to simplify plan administration as much as possible, but it still

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1. Absent an initial finding that Rosemary waived her contingent beneficiary rights in plaintiff's pension plan, the Court cannot determine whether plaintiff is entitled to nominate Donna as his beneficiary pursuant to the NJNG Plan.

> requires administrators to consider divorce decrees to determine whether they are [QDROs], which are enforceable. 29 U.S.C. § 1056(d) (3) (G) (i).[2]

Alternatively, a minority of Circuit courts have found that a clear beneficiary designation pursuant to an ERISA plan may not be set aside by a waiver in external documents. *See Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990). Both those courts found that Congresses' stated intent that ERISA plans be "uniform in their interpretation and simple in their application" dictate that plan administrators have no obligation to look beyond the plan documents to determine if a waiver occurred. *See McMillan*, 913 F.2d at 311 (citing H. Rep. No. 533, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650); *Krishna*, 7 F.3d at 13. Further, the Sixth Circuit emphasized that ERISA explicitly provides that plan administrators must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of ERISA." 29 U.S.C. § 1104(a)(1)(D). *See McMillan*, 913 F.2d at 311-12 (stating that the "clear statutory command of [29 U.S.C. § 1104(a)(1)(D)], together with the plan provisions answer the question; the documents control).

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2. The Fourth Circuit further observed that because Congress required that ERISA plan administrators to evaluate documents to determine whether they qualify as QDROs, there are "situations when ERISA requires plan administrators to consult documents outside the plans themselves. *Altobelli*, 77 F.3d at 81.

Although the Third Circuit has not yet had occasion to decide this question, two district courts in New Jersey presented with this issue have reached (as the Circuit courts) contrary decisions. First, in *John Hancock Mutual Life Insurance Company v. Timbo,* the district court adopted the position of the majority of Circuits in finding that external documents beyond the plan documents could be referenced to determine whether a waiver of benefits occurred. 67 F. Supp. 2d 413, 419-20 (D.N.J. 1999). Specifically, the court concluded that although the divorce decree disclosed that the defendant ex-wife did not clearly and specifically waive her beneficiary interest in the decedent's retirement plan insurance policy, the court relied on the decree to further find that the defendant did waive any interest in the decedent's savings and stock investment plan. *See id.*

Alternatively, in *Zienowicz,* another district court determined that "because [29 U.S.C. § 1104(a)(1)(D)] is clear on requiring that plan administrators follow the plan documents in making beneficiary designations and because of the strong interest in the uniform, simple administration of ERISA plans, the Court concludes that the Third Circuit would follow the Sixth and Second Circuits on this issue." 205 F. Supp. 2d at 344. In adopting the minority view, the court noted that the divorce judgment between the defendant ex-wife and the decedent could not be considered in light of the fact that the plan documents at issue clearly designated the defendant as the beneficiary of the decedent's life insurance policy.[3] *Id.* at 344.[4]

3. The divorce judgment provided that "[e]ach party shall be the sole owner of their respective retirement and employment benefits." *Id.* at 342.

(Cont'd)

Having reviewed that record in this matter and heard oral argument, the Court is satisfied that the rule announced by the minority of Circuits more appropriately complies with Congresses' intent in establishing a simple and uniform manner in which to administer ERISA benefit plans. As noted, ERISA requires that plan administrators discharge their obligations "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). That unambiguous provision requires that the Court accept the beneficiary designation indicated in the plan absent specific circumstances not applicable here.[5] Indeed, neither party has disputed that Rosemary Byrne is the designated beneficiary according to the NJNG Plan.

The NJNG Plan enables participants to revoke the automatic surviving spousal annuity form of payment available to married NJNG Plan participants.

> Any election to revoke the automatic surviving spouse option shall not take effect unless the

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4. The court alternatively held that even if the majority view were adopted, the facts of the case did not warrant a finding that the defendant waived her interest in the decedent's life insurance policy. *Id.* Notwithstanding the court's alternate holding, it is clear that the court considered the minority view the rule that the Third Circuit would adopt. *Id.*

5. For example, amendments to ERISA created a limited exception wherein a valid QDRO could override the plain language of plan documents and thus reassign employee or beneficiary benefits. *See* 29 U.S.C. § 1056(d)(3)(A). There is no QDRO in place here purporting to reassign Rosemary's beneficiary status under plaintiff's pension plan.

Appendix B

> Participant's spouse gives written consent on a form provided by the Committee for such purpose, which consent acknowledges the effect of the election to waive, and which consent is witnessed by a notary public.
>
> . . . .
>
> (b) *The election period applicable to any participant begins on the date that the Committee is required to provide he Participant with notice of his right to make the election, as described in paragraph (a) above, and ends on the date his benefits are to commence.*

See Bottino Aff. at Ex. A, ¶ 8.1(d) (emphasis added).

The NJNG Plan further contains specific rules for revoking the automatic surviving spouse option. Thus, according to 29 U.S.C. § 1104(a)(1)(D), *i.e.*, "the documents and instruments governing the plan," plaintiff may not now change the beneficiary of his pension benefit plan to nominate his current wife Donna. Admittedly, this case is unusual in that plaintiff not only seeks that the Court find that his ex-wife Rosemary waived her beneficiary interest in plaintiff's pension benefit plan, but also asserts that plaintiff should be permitted to nominate Donna as his beneficiary under the NJNG Plan notwithstanding the fact that such an election is expressly prohibited by the plan documents.[6]

6. *See* Bottino Aff. at Ex. A, ¶ 8.1(d). ("The election period applicable to any participant . . . ends on the date his benefits are to commence.").

Notwithstanding the distinct factual circumstances here, the "federal policy of administering the plan according to its documents must be respected in order to ensure that the purpose of ERISA is effectuated." *Fox Valley,* 897 F.2d at 284 (Ripple, J., dissenting). Thus, because the terms of the NJNG Plan prohibit the changing of a contingent participant once benefit payments have commenced, plaintiff is not free to change his contingent participant under the NJNG Plan from Byrne to Donna.

The Court recognizes that this rule may have harsh effects on participants in pension benefit plans such as the one administrated by NJNG. Plaintiff noted at oral argument that there is a significant public policy in allowing participants in pension benefit plans to designate the beneficiary of their choosing. Plaintiff further argues that the only prejudice to defendant in this case would be *de minimus* – a simple administrative actuarial recalculation based on Donna's age versus that of Rosemary. The Court appreciates plaintiff's efforts to nominate his current as the beneficiary of his pension benefit plan and realizes that the plan documents here do not offer any opportunity for participants to change beneficiaries after the commencements of benefit. The Court further appreciates that it is unlikely that plaintiff could attain a QDRO replacing Rosemary and nominating Donna. However, Congresses's declared intent in establishing a simple and uniform process for administering employee benefit plans overrides individual considerations.

In other words, one can envision circumstances in which unchecked, "administrative recalculations" cast fixed,

actuarial procedures utilized in designing and implementing employee pension benefit plans into uncertainty. One can further image how those circumstances may result in significantly higher administrative costs to maintain those plans or, at worst, may discourage employers from maintaining such plans at all.[7] As one distinguished jurist has noted:

> ERISA is full of unyielding rules, designed to simplify administration. Rules have their flaws; loopholes and overbreadth, both producing unpalatable outcomes in the event of unanticipated circumstances, are among them. But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation. Congress and pension plans elected to use rules rather than standards; patterns of avoidance mean that we transmute the approach Congress chose into the one it rejected.

Fox Valley, 897 F.2d at 284 (Easterbrook, J., dissenting). Although the Court shares then Chief Judge Wilkinson's observation in *Altobelli* that "the equities of the [majority view] seem tempting," 77 F.3d at 82 (Wilkinson, C.J., dissenting), it is obligated nevertheless to interpret statutes without passion and consonant with Congresses's intent.

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7. Indeed, this case in some ways highlights the issue in light of the fact that plaintiff attempted to amend the designated beneficiary twice since the time he started receiving pension benefits. Each amendment, if permitted, would require a retroactive recalculation of his pension benefits and payments received.

Accordingly, plaintiff's motion for summary judgment as to Count I of the Amended Complaint is denied and defendant's cross-motion for summary judgment is granted.

C. *Failure to Provide Plan Documents*

As noted, Count II of the Amended Complaint seeks that the Court impose civil penalties on defendant for failure to provide him with plan documents within thirty days of a written request. In particular, plaintiff requests that the Court find that defendant failed to furnish plan documents for 100 days beyond the thirty day deadline and thus impose a $100 per day penalty for each day defendant failed to produce the plan documents. *See* Pl. Br. at 8.

Section 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4) requires that plan administrators provide participants with the latest plan documents upon receipt of a written request by a plan participant or beneficiary. Section 502(c) of ERISA, 29 U.S.C. § 1132(c), further provides that civil penalties may be imposed on administrators who run afoul of the thirty day rule. Courts, however, are empowered with broad discretion in imposing civil penalties for violations of § 502(c). *See Maiuro v. Federal Express Corp.*, 843 F. Supp. 935, 943 (D.N.J. 1994), *aff'd without op.*, 43 F.3d 1461 (3d Cir. 1994) (citing *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 153 (3d Cir. 1987), *aff'd in part, rev'd in part on other grounds*, 489 U.S. 101 (1989)). In defining the contours of a court's discretion in applying civil penalties, the Third Circuit has commented that where the claim "is not colorable, and if the employer displayed no bad faith in responding to the claim – taking somewhat too long to

respond to it, for instance, but not ignoring it entirely – then the district court would be well within its discretion in setting damages at $0." *Id.* (Quoting *Firestone*, 828 F.2d at 153).

In this matter, the Court declines to impose section 502(c) penalties in light of the fact that although the Court disagrees with defendant's contention that it provided plaintiff with plan documents within thirty days after plaintiff first explicitly requested them, the Court does not attribute any bad faith to defendant's actions in not providing the NJNG Plan documents in accordance with section 104(b)(4). Specifically, defendant argues that plaintiff's June 19, 2002 correspondence in which plaintiff asked that defendant "forward a copy of any summary plan revisions which are presently applicable"[8] was not an express request for plan documents. *See* Def. Br. at 20-21.

However, when plaintiff's June 19th letter is read in its entirely, it is clear that plaintiff was concerned that he did not possess the most current plan documents and, therefore, requested that he be forwarded any revisions to the NJNG Plan.[9] Further, in light of section 104(b)(4)'s instruction that plan administrators "shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description," *see* 29 U.S.C. § 1024(b)(4), defendant should have understood plaintiff's request for "any

8. *See* Bottino Aff. at Ex. L.

9. As plaintiff's letter noted, he was worried that in denying his administrative appeal, defendant's pension actuary referenced plan provisions not contained in plaintiff's version of the plan documents. *See* Bottino Aff. at Ex. L.

summary plan revisions" as a solicitation for the "latest updated summary plan description."

Notwithstanding defendant's argument, the Court will exercise its discretion and choose not to penalize defendant for failing to supply information which, at the time it did so, operated under a belief that had not been given clear notice of plaintiff's request for the latest plan documents. *See Firestone,* 828 F.2d at 153 (stating that lack of bad faith by employer would justify "setting damages at $0"). Ac.cordingly, the Court will deny plaintiff's request for the $100 per day penalty pursuant to section 502(c).

CONCLUSION

For the foregoing reasons, the Court denies plaintiff's motion for summary judgment as to Counts I and II of the Amended Complaint and grants defendant's cross-motion for summary judgment. Each party will bear its own costs and fees. The Court will enter an appropriate Order.

Dated: July 23, 2004

s/
Stanley R. Chesler, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 13, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-3620

JAMES M. MCGOWAN, SR.,

Appellant

v.

NJR SERVICE CORPORATION;
NEW JERSEY NATURAL GAS COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-01035)
District Judge: Honorable Stanley R. Chesler

Present: SCIRICA, *Chief Judge*, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and BECKER* *Circuit Judges*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

---

* The Honorable Judge Edward R. Becker vote limited to panel rehearing only.

Appendix C

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is hereby denied.

By the Court,
/s/ Franklin S. Van Antwerpen
Circuit Judge

Dated: October 13, 2005

(4)

No. 05-853

FILED
DEC 26 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES M. McGOWAN, SR.,

Petitioner,

v.

NJR SERVICE CORPORATION and
NEW JERSEY NATURAL GAS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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The United States does not dispute that the Courts of Appeal are divided on this issue; eight circuits have split 5-3. The dispute has lingered since 1990 when the Sixth Circuit disagreed with the Seventh Circuit. 16 years is more than long enough for a conflict to linger.

The dispute is deeper than a simple head count of circuits. The Seventh Circuit addressed the issue *en banc*, and it split 7 to 4. The Third Circuit split three ways. The passage of time has not helped; no one rationale has come to the forefront.

Only four circuits have not addressed the issue – the District of Columbia, the First Circuit, the Eighth Circuit and the Eleventh Circuit. We do not know the facts of the still to be decided cases which may emanate from any of those circuits or when those cases will be decided. Yet, while the United States would have this Court defer consideration of Jim McGowan's right to designate his wife as his spouse, all twelve courts of appeal will wait and the rights of retiring people will continue to be a function not of statutory construction but of the geographical circuit in which the employees' plans are administered. The issue begs for resolution from this Court.

The United States does not disagree; it suggests that the Court should deny this petition because it does not isolate totally the precise issue. This case is different in that McGowan remarried after he had begun receiving benefits from his NJR pension plan. That difference is not so substantial that it warrants deferral of the issue to another day.

The United States contends that this Court should not exercise its right to construe federal common law on the issue, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), because the statute expressly denies McGowan the right to change beneficiaries after he has begun receiving benefits (Brief at 13 citing 29 U.S.C. § 1055(C)(3)(A), § 1055(c)(8) and regulations promulgated by the Secretary of the Treasury).

The construction of these statutes and regulations either presumes that the participant remains married to his spouse or does not care if the participant remains married. People – even older, retired people – divorce; others become widows and widowers. The statute does not address their rights to designate the new husband or wife as the person entitled to receive benefits for the employee's spouse. The position of the United States is that the new spouse of the retired employee is simply out of luck, that the spousal benefits died along with the deceased or divorced spouse.

ERISA does not address the rights of retired people who divorce, as in this case, or who remarry after the death of a spouse. We have no statistics on the number of people within this category, but the Court may judicially notice that the population is living longer and longer and deeper and deeper into retirement.

There is disagreement among the lower courts and even within the Third Circuit whether a voluntary waiver – as Rosemary Byrne made in connection with her Marital Settlement Agreement – constitutes an alienation of benefits within the ERISA prohibition against alienation of benefits, 29 U.S.C. § 1056(d)(1). A person may waive any provision of a statute intended for his or her benefit provided only that

the waiver contradicts no express statutory provision, *New York v. Hill*, 528 U.S. 110, 116 (2000), *Shutte v. Thompson*, 82 U.S. 151, 159 (1872). Rosemary's waiver was not inconsistent with the statutory purpose of protecting the employee, James, and his spouse, which Rosemary was not.

For the preceding reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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FEB 6 - 2006
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SUPREME COURT, U.S.

No. 05-853

IN THE

Supreme Court of the United States

JAMES M. McGOWAN, SR., Palm City, Florida,

Petitioner,

v.

NJR SERVICE CORPORATION and
NEW JERSEY NATURAL GAS COMPANY,
Wall Township, New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit correctly rule that the administrator of an ERISA-qualified pension plan may not recognize a waiver contained in a non-QDRO state domestic relations order offered by a participant to change his designation of a plan beneficiary where such change is prohibited by the provisions of the plan?

2. Does the ruling of the Third Circuit Court of Appeals warrant review by this Court?

LIST OF PARTIES TO THE PROCEEDINGS

James M. McGowan, Sr., Palm City, Florida, Petitioner.

NJR Service Corporation and New Jersey Natural Gas Company, Wall Township, New Jersey, Respondents.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The decision of the U.S. Court of Appeals for the Third Circuit is published as *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3rd Cir. 2005). The decision of the U.S. District Court, District of New Jersey is unpublished. It is captioned as *McGowan v. New Jersey Natural Gas Co.*, Civ. A. No. 03-1035 (SRC) (July 23, 2004).

BASIS FOR U.S. SUPREME COURT JURISDICTION

The U.S. Court of Appeals for the Third Circuit ruled in favor of NJR Service Corp., et al., on September 13, 2005. McGowan petitioned for rehearing *en banc* on September 26, 2005. The Court of Appeals denied the petition on October 13, 2005. The United States Supreme Court is authorized to consider this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN CASE

29 U.S.C. § 1055(a):

> (a) Required contents for applicable plans
>
> Each pension plan to which this section applies shall provide that –
>
> (1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

29 U.S.C. § 1056(d):

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

* * * *

(3)(A) Paragraph 1 shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph –

(i) the term "qualified domestic relations order" means a domestic relations order –

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met,

* * * *

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1103(c):

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on October 22, 2004), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1104(a):

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT OF THE CASE

From May 12, 1969 to November 30, 1996, James M. McGowan, Sr. ("Plaintiff" or "McGowan") was employed by New Jersey Natural Gas Company ("the Company"). During his employment, Plaintiff accrued benefits under the New Jersey Natural Gas Company Plan For Retirement Allowances For Non-Represented Employees ("the Plan"). The Company was the Administrator of the Plan.

On August 1, 1996, shortly before his retirement, Plaintiff completed a beneficiary designation form, wherein he designated Rosemary Byrne McGowan (hereinafter referred to as "Ms. Byrne"), his wife at that time, as his beneficiary under the Plan.[1] On October 16, 1996, Plaintiff executed a form wherein he elected to receive his retirement benefit under the Plan in the form of the "Automatic Surviving Spouse Option," which is an annuity for his life, with a 50% survivor annuity payable to his spouse, Ms. Byrne, who happened to be Plaintiff's second wife. Under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"), this form of retirement benefit is referred to as a "qualified joint and survivor annuity" or "QJSA". 29 U.S.C. § 1055. Following Plaintiff's retirement on December 1, 1996, Plaintiff's monthly Plan benefits commenced.

In 1998 Plaintiff contacted the Company's Manager of Benefits and Compensation and inquired as to whether he could change his beneficiary under the Plan. Plaintiff was advised that the terms of the Plan prohibited the designation

---

1. Technically, Ms. Byrne was a "contingent participant" under the terms of the Plan.

of a new contingent beneficiary as his benefit payments had already commenced. Shortly thereafter, Plaintiff and Ms. Byrne executed a Marital Settlement Agreement dated July 23, 1998, in which Ms. Byrne "waive[d] any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Natural Gas Company Employee Pension Plan of [Plaintiff]." On July 27, 1998, Ms. Byrne executed a form wherein she consented to the naming of Shirley McGowan, Plaintiff's first wife, as Plaintiff's beneficiary under the Plan. On August 6, 1998, an attorney representing Mr. McGowan wrote to the Company reiterating McGowan's request to change his beneficiary under the Plan from Ms. Byrne to Shirley McGowan. The Company denied this request and Plaintiff did not pursue the matter further. Plaintiff subsequently was legally divorced from Ms. Byrne. The Final Judgment of Dissolution of Marriage dated May 24, 1999 incorporated by reference the Marital Settlement Agreement.

On November 3, 2001, Plaintiff married Donna McGowan (referred to herein as "the Current Wife") and again sought to change his designation of beneficiary—this time to make the Current Wife the beneficiary. The Company again informed Plaintiff that he could not change his beneficiary. The Plaintiff appealed. The Company's Benefits Administration Committee upheld the decision to deny Plaintiff's request to change his beneficiary.

On March 5, 2003, McGowan commenced the within action by filing a two-count Complaint against NJR Service Corporation in the U.S. District Court for the District of New Jersey. Only the first count, which sought declaratory relief in the form of an order directing the Company to designate

the Current Wife as Plaintiff's contingent beneficiary under the Plan, is the subject of this appeal.[2]

With no dispute existing as to any material fact, both parties moved for summary judgment. On July 23, 2004, the District Court issued its opinion and order denying Plaintiff's motion for summary judgment, granting the Company's cross-motion for summary judgment and dismissing Plaintiff's action. The District Court held that under ERISA, the Company was required to administer the pension plan strictly in accordance with the terms of the written plan documents and could not look to documents outside of the plan such as the Marital Settlement Agreement, which contained Ms. Byrne's purported waiver of her beneficiary rights. The District Court further ruled that under the express terms of the Plan, a participant may not change his or her contingent participant after benefits commence.

A three-judge panel of the U.S. Court of Appeals for the Third Circuit affirmed the District Court's ruling. *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3rd Cir. 2005). The majority of the Court, relying in part upon guidance provided by this Court in *Boggs v. Boggs*, 510 U.S. 833, 117 S. Ct. 1754 (1997), held that the Plan Administrator was not required to recognize Ms. Byrne's waiver of her beneficiary interest under the Plan. Additionally, one member of the panel, Judge Becker, in a concurring opinion also affirmed on the same ground as the District Court's opinion, specifically that plan administrators may not look beyond the plan documents in connection with the administration of

2. On July 7, 2003, Plaintiff filed an Amended Complaint that is substantially the same as his original Complaint except that it correctly named New Jersey Natural Gas Company, the Administrator of the Plan, as the defendant.

an ERISA qualified plan, citing 29 U.S.C. § 1104(a)(1)(D). Judge Becker explained that a rule which permitted consideration of documents outside the plan would undermine one of the principle goals of ERISA that "plans be uniform in their interpretation and simple in their application," citing H.R. Report 93-533 (1974), 1974 U.S. Code Congressional and Administrative News 4639, 4650. One member of the panel, Judge Fuentes, dissented, finding that, under federal common law, waivers that are sufficiently specific may be recognized by plan administrators.

Plaintiff filed a petition for rehearing *en banc*. By Order dated October 13, 2005, the petition was denied.

REASONS FOR DENYING THE PETITION

PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED AS THIS COURT'S RULING IN *BOGGS v. BOGGS* CONTROLS THE OUTCOME OF THIS CASE AND INDICATES THAT THE MINORITY RULE IS CORRECT

Certiorari should be denied in this case because this Court in *Boggs v. Boggs* has already resolved the central issue in this case as to which the circuits are split, and the Third Circuit, following *Boggs*, correctly ruled in the case at bar. As Plaintiff pointed out in his Petition, the Circuit Courts of Appeals are split regarding the issue of whether plan administrators may recognize a waiver contained in a divorce decree as a basis for changing the participant's designation of a plan beneficiary. A so-called "majority rule" and "minority rule" have developed on the issue – under the majority rule, the courts look to federal common law to determine whether an external waiver is sufficiently specific

to be valid; under the minority rule, the courts require administrators to adhere strictly to plan documents and ignore external waivers except in limited circumstances specified in ERISA. *Compare Hill v. AT&T*, 125 F.3d 646, 650 (8th Cir. 1997); *Estate of Altobelli v. International Bus. Mach. Corp.*, 77 F.3d 78, 80 (4th Cir. 1996); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732 (1995); *Fox Valley & Vicinity Constr. Workers Fund v. Brown*, 897 F.2d 275, 280 (7th Cir.) (en banc), *cert. denied*, 498 U.S. 820, 111 S. Ct. 67 (1990), *with Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993); and *McMillan v. Parrot*, 913 F.2d 310 (6th Cir. 1990).

However, this Court's decision in *Boggs v. Boggs* resolved the "split" among the circuits and clearly indicated that the minority rule is the correct one. Further, Circuit Courts considering this and similar issues since *Boggs* have relied upon it for guidance. *See, e.g., Branco v. UFCW-Northern California Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002); *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997).[3]

In *Boggs*, this Court made three important pronouncements regarding ERISA that effectively decided the issues in the case at bar. First, this Court ruled that ERISA must be construed in the strictest possible manner and departures from the strict terms of the statute cannot be allowed. *Boggs*, 520 U.S. at 841. Second, this Court ruled that beneficiary status may be conferred on non-plan participants only in narrow circumstances, namely by way of a QJSA or a Qualified Domestic Relations Order

3. *But cf. Manning v. Hayes*, 212 F.3d 866, 872-74 (5th Cir. 2000) (continuing to follow majority rule in case involving life insurance proceeds, distinguishing *Boggs* on the basis that *Boggs* concerned an annuity in a community property state).

("QDRO"). *Id.* at 851. Finally, the Court ruled that the "principle objective" of ERISA is to protect plan participants and beneficiaries. *Id.* at 845. As will be explained more fully below, applying these principles in the context of the instant case demonstrates that a plan administrator may not recognize a waiver contained in a non-QDRO state domestic relations order, such as the divorce decree issued to Mr. McGowan and Ms. Byrne in Florida in 1999.

A. Under *Boggs*, ERISA must be construed in the strictest manner possible.

In *Boggs*, this Court acknowledged that ERISA is an intricate and comprehensive statute the provisions of which must be carefully followed and strictly construed. *Id.* at 841. This Court also instructed that ERISA was carefully and deliberately created by Congress to protect the economic security of surviving spouses, and its provisions must be strictly construed with that goal in mind.[4] *Id.* at 843.

1. Under *Boggs*, Plan Administrators are Bound by the Terms of the Plan

In the case at bar, it is undisputed that the Plan is an "employee pension benefit plan," *see* 29 U.S.C. § 1002(2), and is thus governed by ERISA's provisions. 29 U.S.C. § 1003. Under ERISA, "every employee benefit plan" must be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). In addition, ERISA

4. Of note, prior to *Boggs*, cases following the majority rule held that resorting to federal common law was proper because ERISA is silent as to what constitutes a valid waiver. *Boggs* shows that this rationale is flawed. ERISA is silent as to what constitutes a waiver because it prohibits plan administrators from looking at external documents other than a QDRO.

specifies the responsibilities that fiduciaries, such as the Company,[5] owe to plan participants and beneficiaries. In particular, ERISA requires that fiduciaries, in administering qualified plans, discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this [statute]." 29 U.S.C. § 1104(a)(1)(D). Thus, in light of this Court's instruction in *Boggs* that ERISA must be carefully followed and strictly construed, the Company is required to operate the Plan strictly in accordance with the terms of the Plan and may not exercise its discretion to administer the Plan in any other manner.

2. Based on *Boggs*, the Plan must follow the designation on the QJSA

ERISA requires the Plan to pay benefits to plan participants who are married on their annuity starting date in the form of a QJSA. 29 U.S.C. § 1055. A QJSA is defined as an annuity for the life of a married participant with a survivor annuity for the life of the spouse which is not less than 50% of (and is not greater than 100% of) the amount of the annuity which is payable during the joint lives of the participant and spouse. 29 U.S.C. § 1055(d); 26 U.S.C. § 417(b). In the case at bar, Plaintiff received his retirement benefit in the form of a QJSA. ERISA contains specific rules as to when and how a QJSA payable to a spouse can be waived and revoked (so that the spouse is no longer the contingent participant).

ERISA provides that a participant "may elect at any time during the applicable election period" to waive the QJSA

5. The Company is a fiduciary of the Plan due to its status as Plan Administrator. *See* 29 U.S.C. § 1002(21); the Plan Section 9.1.

form of benefit. 29 U.S.C. § 1055(c)(1). For purposes of the QJSA, the "applicable election period" is defined as the "90-day period **ending on the annuity starting date**." 29 U.S.C. § 1055(c)(7) (emphasis added).

Regulations promulgated under ERISA underscore the requirement that any spousal waiver of a QJSA form of benefit must occur *in advance* of the annuity starting date:

> The annuity starting date is . . . used to determine when a spouse may consent to and a participant may waive a QJSA. **A waiver is effective only if it is made . . . before the annuity starting date.**

Treas. Reg. Section 1.401(a)-20, Q&A-10(a) (emphasis added).

Section 8.1 of the Plan conforms to this requirement in that it provides that the period during which a participant may select an optional form of benefit (which requires written consent of spouse) begins not more than 90 days before a married participant may commence receipt of his retirement allowance, and ends on the date his benefits are to commence.

Thus, even if the language in Plaintiff's Marital Settlement Agreement could be interpreted as a valid waiver of Ms. Byrne's right to be the contingent participant of any death benefits payable under the Plan (which Defendant contends is not the case), Defendant cannot recognize the waiver because Plaintiff's benefits had already commenced.

The Treasury Regulations specifically contemplate this result, even wherein a participant is divorced subsequent to his or her annuity starting date:

> If a participant dies after the annuity starting date, **the spouse to whom the participant was**

> **married on the annuity starting date is entitled to the QJSA protection. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death,** except as provided in a [qualified domestic relations order].

Treas. Reg. Section 1.401(a)-20, Q&A-25(b)(3) (emphasis added). As underscored above, the Regulations clearly provide that the spouse to whom a participant is married on his annuity starting date is entitled to joint and survivor annuity protection even if a divorce subsequently occurs. While the Regulations do recognize that the spousal protection can be "waived and consented to" by the spouse, that waiver is effective **only if it is made before the annuity starting date or pursuant to a QDRO**, as provided in the Regulations cited *supra*. *See* Treas. Reg. Section 1.401(a)-20, Q&A-10.[6]

In *Boggs*, this Court recognized that the provisions of ERISA must be strictly construed. Thus, under *Boggs*, a plan participant cannot change his beneficiary designation unless (1) that participant designates a new contingent beneficiary in accordance with the applicable requirements of the plan prior to the commencement of benefits, or (2) he thereafter obtains a QDRO.

---

6. It is undisputed that Plaintiff could have obtained a QDRO, but, for reasons never disclosed, he elected not to do so.

B. *Boggs* held that the anti-alienation provisions of ERISA prohibit the conferring of beneficiary status on non-plan participants except in certain circumstances.

This Court recognized in *Boggs* that the anti-alienation provisions of ERISA prohibit the conferring of beneficiary status under an ERISA plan on non-participants except in narrow circumstances, namely by way of a QJSA or a QDRO. *See Boggs*, 520 U.S. at 847 ("Apart from these detailed provisions, ERISA does not confer beneficiary status on non-participants by reason of their marital or dependent status."). The Court emphasized that the QJSA and the QDRO are the only exceptions to the anti-alienation provisions of ERISA, which provide that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). According to *Boggs*, "ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, [the QJSA and QDRO], **which are not subject to judicial expansion.**" *Boggs*, 520 U.S. at 851 (emphasis added).

Thus, according to *Boggs*, non-QDRO state domestic relations orders (such as the divorce judgment in the instant case) cannot confer beneficiary status on a non-participant, no matter how clear the waiver language is in such order. In light of *Boggs*, the cases following the "majority rule" and holding that waivers in non-QDRO state domestic relations orders can confer beneficiary status on non-participants clearly were wrongly decided.

C. Under *Boggs* the "principle objective" of ERISA is to protect plan participants and beneficiaries

Boggs explicitly holds that the "principle object of [ERISA] is to protect plan participants and beneficiaries. *Id.* at 845. Therefore, any holding that would allow a non-participant/non-beneficiary, such as Plaintiff's Current Wife, to acquire an interest in benefits under a Plan other than by way of a QJSA would conflict with this "principle objective of ERISA."

CONCLUSION

Plaintiff's Petition for Writ of Certiorari should be denied because in *Boggs v. Boggs* this Court already settled the split among the circuits referenced in Plaintiff's Petition, and the Third Circuit properly followed *Boggs* in the case at bar.

Respectfully submitted,

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No. 05-853

In the Supreme Court of the United States

JAMES M. MCGOWAN, SR., PETITIONER

v.

NJR SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

A pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires a married participant to decide, before retirement, whether to receive benefits in the form of a qualified joint and survivor annuity (QJSA). Petitioner selected that option, retired, and began receiving benefits. The question presented is whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by petitioner's former spouse of her right to the survivor annuity.

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In the Supreme Court of the United States

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NJR SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended, governs the payment of benefits pursuant to employee benefit plans. Among other things, it requires certain pension plans, primarily defined benefit pension plans, to provide for the payment of benefits in the form of a qualified joint and survivor annuity (QJSA). 29 U.S.C. 1055(a)(1); see *Boggs* v. *Boggs*, 520 U.S. 833, 842 (1997). Under a QJSA, a vested participant receives an annuity for his or her lifetime, and the participant's spouse, if he or she survives the participant, receives a survivor's annuity that may not be less than 50% of

the annuity payable during the joint lives of the participant and spouse. 29 U.S.C. 1055(d)(1).

A participant may elect to waive the QJSA form of benefits, with the written consent of the spouse, "during the applicable election period." 29 U.S.C. 1055(c)(1)(A)(i). A participant may also revoke any such election during the applicable election period. 29 U.S.C. 1055(c)(1)(A)(ii). The applicable election period for a QJSA is generally "the 90-day period ending on the annuity starting date" (*i.e.*, the date as of which annuity payments begin to be made). 29 U.S.C. 1055(c)(7)(A). A plan is required to notify a participant of the election right within a "reasonable period of time" and in a manner consistent with regulations of the Secretary of the Treasury. 29 U.S.C. 1055(c)(3)(A). Those regulations generally require that the written explanation be given no less than 30 days and no more than 90 days before the annuity starting date. 26 C.F.R. 1.417(e)-1(b)(3)(ii).[1]

More generally, ERISA requires each pension plan to "provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). One exception to that anti-alienation rule applies to a state domestic relations order that is determined by the plan to be a qualified domestic relations order (QDRO) under standards set forth in ERISA. 29 U.S.C. 1056(d)(3).[2] A QDRO may assign a right to any benefit payable with respect to a participant, but may not "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the

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[1] The Pension Protection Act of 2006, Pub. L. No. 109-280, § 1102(a), 120 Stat. 1056, extends the 90-day period to 180 days. Because this provision is effective for years beginning after December 2006, it does not apply to this case.

[2] A QDRO is also excepted from the operation of ERISA's preemption provision. See 29 U.S.C. 1144(b)(7).

plan," or "require the plan to provide increased benefits (determined on the basis of actuarial value)." 29 U.S.C. 1056(d)(3)(A), (D)(i) and (ii). If the order qualifies as a QDRO, the pension plan must provide for the payment of benefits in accordance with the QDRO's requirements. 29 U.S.C. 1056(d)(3)(A).

Under ERISA, persons who manage an employee benefit plan or have any discretionary authority or responsibility in the administration of the plan are fiduciaries. 29 U.S.C. 1002(21)(A)(i) and (iii). A fiduciary must discharge his or her duties with respect to a plan solely in the interest of participants and beneficiaries and, among other things, "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

2. Respondent New Jersey Natural Gas Company has a pension plan that, consistent with the statutory and regulatory requirements, allows a participant to waive, with spousal consent, the QJSA form of benefits available to married plan participants. Pet. App. 49a. The plan provides that the period during which a participant may elect to waive the QJSA begins on the date the plan is required to give the participant notice of his right to make that election "*and ends on the date his benefits are to commence.*" *Id.* at 50a (citation omitted).

Petitioner is a former employee of New Jersey Natural Gas Company. Pet. App. 3a, 42a. While still employed with the company, he married Rosemary Byrne, and in August 1996, he designated her as his beneficiary under the company's pension plan. *Id.* at 42a. In October 1996, petitioner elected to receive his benefits in a joint and survivor annuity, with a 50% survivor annuity payable to Byrne in the event of his death. *Ibid.* In November 1996, petitioner re-

tired and began to receive benefits under the plan. *Id.* at 3a, 42a.

In July 1998, petitioner and Byrne entered into a Marital Settlement Agreement under which she purported to "waive[] any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Gas Company Employee Pension Plan of the Husband." Pet. App. 3a, 43a (citations omitted).[3] That agreement was incorporated into a final judgment of divorce in May 1999. *Id.* at 3a, 42a-43a. The parties agree that the agreement did not qualify as a QDRO. Pet. App. 10a n.3, 49a n.5.

In November 2001, five years after he retired, petitioner married Donna McGowan, his current spouse. Pet. App. 3a, 43a. Soon thereafter, petitioner sought to name Donna McGowan as his spousal beneficiary for purposes of his joint and survivor annuity. *Ibid.* Respondent NJR Service Corporation, the plan administrator, denied the request. *Id.* at 3a-4a, 43a. After exhausting plan remedies, petitioner filed an action in district court, seeking an order directing the plan administrator to designate Donna McGowan as the spouse entitled to the survivor's annuity. *Id.* at 43a-44a; see 29 U.S.C. 1132(a)(1)(B) (participant may file a civil action "to enforce his rights under the terms of

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[3] In July 1998, Byrne consented in writing to petitioner's election of Shirley McGowan, petitioner's first wife, as the spouse who would receive a survivor's annuity under the plan. Pet. App. 3a, 43a. In August 1998, respondent NJR Service Corporation, the plan administrator, denied petitioner's request to record Shirley McGowan as the spousal beneficary for that purpose. *Id.* at 3a. Petitioner does not challenge that denial. See Pet. 3.

the plan, or to clarify his rights to future benefits under the terms of the plan").[4]

3. The district court granted summary judgment to respondents. Pet. App. 41a-55a. The court framed the issue as "whether an ERISA pension benefit plan participant receiving benefits, whose plan does not permit a change of beneficiaries once benefits have commenced, may change the designated beneficiary in his plan from the participant's ex-wife to his current wife without a valid Qualified Domestic Relations Order ('QDRO')." *Id.* at 45a; see 29 U.S.C. 1056(d)(3) (discussing requirements for a QDRO, which, as an exception to the general rule in 29 U.S.C. 1056(d)(1) "that benefits provided under the [pension] plan may not be assigned or alienated," is a mechanism for redirecting benefits to an alternate payee named in a domestic relations order obtained in a divorce). To answer that question, the district court considered, as a "threshold question," whether a beneficiary of an ERISA plan can waive her rights to benefits under the plan. Pet. App. 46a. The court reasoned that, "[a]bsent an initial finding that Rosemary [Byrne] waived her contingent beneficiary rights in [petitioner's] pension plan, the Court cannot determine whether [petitioner] is entitled to nominate Donna [McGowan] as his beneficiary." *Id.* at 46a n.1.

The district court concluded that a clear beneficiary designation pursuant to an ERISA plan cannot be set aside by a waiver in external documents absent "specific circumstances" such as a QDRO. Pet. App. 49a & n.5. The district court reasoned that that result comports with congressional intent to provide for simple and uniform plan administra-

[4] Petitioner also sought civil penalties under 29 U.S.C. 1132(c) for respondents' failure to provide plan documents. Pet. App. 44a. The court of appeals affirmed the district court's denial of relief, *id.* at 17a-18a, and petitioner does not seek review on that issue. Pet. 4.

tion, and with ERISA's requirement that plan administrators discharge their obligations "in accordance with the documents and instruments governing the plan." *Id.* at 49a (quoting 29 U.S.C. 1104(a)(1)(D)). The district court accordingly rejected a rule recognized by a majority of courts of appeals, which gives effect to waivers in non-plan documents as a matter of federal common law. *Id.* at 46a-47a (discussing majority rule).

The district court also concluded that the plan terms in this case prohibit changing a beneficiary once benefit payments have commenced. Pet. App. 49a-51a. Accordingly, the court ruled that Byrne could not waive her rights as a beneficiary so as to permit petitioner to change the designated beneficiary to his current wife.

4. A divided court of appeals affirmed the district court's grant of summary judgment. Pet. App. 1a-40a. The majority reasoned that permitting a beneficiary like Byrne to waive her rights to a surviving spouse's annuity in favor of another spouse without complying with the QDRO provisions would contravene ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1). Pet. App. 13a-17a (Van Antwerpen, J.); *id.* at 19a-26a (Becker, J., concurring).[5] Having concluded that Byrne could not waive her rights as a surviving spouse, the majority did not discuss whether petitioner

[5] Judge Antwerpen agreed with the district court that permitting a waiver in the circumstances presented would be contrary to congressional intent to provide for simple and uniform plan administration and contrary to the requirement in 29 U.S.C. 1104(a)(1)(D) that plan administrators discharge their fiduciary obligations in accordance with governing plan documents. Pet. App. 8a-13a. Judge Becker and dissenting Judge Fuentes rejected those grounds for declining to recognize a waiver. *Id.* at 26a-29a (Becker, J., concurring); *id.* at 37a (Fuentes, J., dissenting).

could have designated his current wife, Donna McGowan, as the surviving spouse.

Judge Fuentes dissented. Pet. App. 30a-40a. He reasoned that the anti-alienation clause does not address waivers, which he regarded as distinct from alienations and assignments. *Id.* at 30a-38a. Judge Fuentes accordingly concluded that ERISA is "silen[t]" with respect to the validity of Byrne's waiver, *id.* at 37a, and that "federal common law should fill the gap" (*id.* at 38a) by "giv[ing] effect to [Byrne's] waiver," *id.* at 40a. Judge Fuentes would have remanded, however, for the district court to consider the further question whether petitioner's designation of Donna McGowan, in light of Byrne's waiver, was valid, noting "good reasons not to honor [the designation]." *Id.* at 35a n.16.

DISCUSSION

The court of appeals correctly held that ERISA entitled respondents not to recognize Rosemary Byrne's purported waiver of her right, under the QJSA provisions of ERISA, to a surviving-spouse annuity as part of a post-retirement arrangement with petitioner to allow him to designate his current spouse to receive that annuity. ERISA has special rules for QJSAs, and no court of appeals has required a plan administrator to recognize a waiver in the QJSA context presented here, where a participant seeks to change the designated surviving spouse in a QJSA after the participant has retired and started to receive annuity payments.

Moreover, while the three-way division of the judges on the panel mirrors a broader conflict that exists in the courts of appeals and the state courts on the question whether a purported waiver by an ERISA beneficiary must be given binding effect as a matter of federal common law, there are substantial reasons to believe that courts that have held

that waivers must be given effect as a matter of federal common law in other circumstances would not do so in the post-retirement, QJSA context presented here. That question, which has arisen outside the QJSA context in various cases, is important to plan administrators and individuals claiming plan benefits. This case, however, arises in an unusual factual context that implicates special rules on which there is no conflict, and thus is not an appropriate case for resolving the broader question of common law waivers that has divided the courts. Accordingly, the petition for a writ of certiorari should be denied.

A. The Court of Appeals' Decision Is Consistent With This Court's Precedents

1. This Court has twice spoken to the preemptive effect of ERISA on state law in the context of deciding spousal rights to a pension under a covered plan. In *Boggs* v. *Boggs*, 520 U.S. 833, 835-836 (1997), the Court held that ERISA preempted state community property law to the extent state law allowed a spouse to make a testamentary transfer of her interest in undistributed pension plan benefits to her sons. The Court reasoned that the state law affirmatively conflicted with ERISA's QJSA provisions by giving rights to a surviving spouse's annuity to persons other than the surviving spouse. *Id.* at 841-844. The Court further reasoned that the specified methods of transfer set forth in the QJSA provisions in 29 U.S.C. 1055, and the QDRO provisions in 29 U.S.C. 1056(d), "give rise to the strong implication that other community property claims are not consistent with the statutory scheme." 520 U.S. at 847.

In *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 143 (2001), the Court held that ERISA preempted a state law that treated a participant's divorce as automatically revoking his desig-

nation of his former spouse as the beneficiary under a life insurance policy and a pension plan. The Court reasoned that the state law

> runs counter to ERISA's commands that a plan shall 'specify the basis on which payments are made to and from the plan,' [29 U.S.C.] § 1102(b)(4), and that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' [29 U.S.C.] § 1104(a)(1)(D), making payments to a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.' [29 U.S.C.] § 1002(8).

Id. at 147. The state law was in conflict, the Court explained, because under that law, "the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow." *Id.* at 151 n.4. The Court further reasoned that the state law interfered with ERISA's goal of enabling employers to establish a uniform scheme of plan administration. *Id.* at 148-149.[6]

2. *Boggs* and *Egelhoff* support the court of appeals' conclusion that the pension plan administrator in this case was not required, as a matter of federal common law, to recognize Byrne's waiver of her rights under petitioner's pension plan as part of an arrangement to enable petitioner ultimately to substitute his current wife as the person entitled to a survivor annuity. The waiver is set out in a property settlement that was incorporated into a state-court divorce decree. Pet. App. 3a, 43a. The parties agreed, however,

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[6] The Court recognized a possible argument that ERISA would not preempt a state "slayer" statute that revoked the beneficiary status of someone who murdered a plan participant. *Egelhoff*, 532 U.S. at 152. The Court did not decide the question, but noted that the principle underlying "slayer" statutes "is well established in the law and has a long historical pedigree predating ERISA." *Ibid.*

that the decree did not qualify as a QDRO. *Id.* at 10a n.3, 49a n.5. Under these circumstances, when the statute provides a specific mechanism for addressing the elimination of a spouse's contingent interest in a QJSA, but that mechanism was not invoked, there is no basis for courts to formulate a supplementary rule as a matter of federal common law.

Moreover, a federal common law rule requiring the plan to recognize the waiver in this situation would affirmatively conflict with ERISA by purporting to determine rights to a survivor's annuity in a manner not authorized by the QJSA provisions in 29 U.S.C. 1055 (2000 & Supp. III 2003) or the QDRO provisions in 29 U.S.C. 1056(d)(3).

For example, Section 1055(c)(1)(A)(i) provides that a waiver of the QJSA must occur "during the applicable election period," which is "the 90-day period ending on the annuity starting date," 29 U.S.C. 1055(c)(7)(a). Section 1055(c)(2)(A)(i) provides that such a waiver must be accompanied by the designation of another beneficiary, unless the surviving spouse's consent to the waiver "expressly permits designations * * * without any requirement of further consent." Here, Byrne's purported waiver (or, in the terms of the statute, her consent to petitioner's waiver) of her QJSA benefit occurred more than a year and a half after the election period was over, and petitioner then did not designate Donna McGowan until several years after Byrne's waiver. See Pet. App. 42a-43a.[7] In addition, by

[7] Section 1055 does not, by its terms, preclude a plan from providing for a new annuity starting date to permit the survivor beneficiary under a QJSA form of benefit to be changed after the original annuity starting date, provided that the plan's procedures for changing the beneficiary otherwise comply with the spousal consent requirements of Section 1055 and that the consent of the person who was the participant's spouse on the original annuity starting date is obtained. Because the

seeking to change the surviving spouse for the annuity after the annuity starting date, the waiver also conflicts with 29 U.S.C. 1056(d)(3)(D)(i), which states that a domestic relations order, in order to qualify as a QDRO, cannot require a plan to provide a "type or form of benefit" or an "option" not otherwise provided by the plan. See note 15, *infra*.

As the Court noted in *Boggs*, the QJSA provisions in 29 U.S.C. 1055 and the QDRO provisions in 29 U.S.C. 1056 "give rise to the strong implication" that allowing other bases for claiming rights to a pension "are not consistent with the statutory scheme." *Boggs*, 520 U.S. at 847. And, as was the case in *Egelhoff*, the requirement in 29 U.S.C. 1104(a)(1)(D) that fiduciaries administer the plan according to its terms does not permit recognition of the waiver and redesignation here, which occurred after the plan's applicable election period closed and after the payment of retirement benefits according to the plan's terms commenced. See Pet. App. 42a-43a, 50a.

3. This Court has recognized circumstances in which it is appropriate for courts to develop federal common law under ERISA. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). The circumstances of this case, however, are not appropriate for fashioning federal common law. The question here does not implicate a gap in the statutory scheme, but a subject ERISA squarely addresses. Because requiring respondents to recognize the waiver in this case would conflict with specific ERISA provisions governing these very circumstances, a requirement that the waiver be given binding effect cannot be justified

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plan in this case does not allow for a new annuity starting date, and because Byrne's waiver did not comply with the requirements of Section 1055, this case does not present the question whether anything in ERISA would preclude a plan from offering such an option.

as a matter of federal common law. "The authority of courts to develop a 'federal common law' under ERISA * * * is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted). Invoking federal common law to require respondents to recognize a waiver would revise the text of ERISA by creating a waiver exception to the rules in 29 U.S.C. 1055 (2000 & Supp. III 2003), 29 U.S.C. 1056(d), and 29 U.S.C. 1104(a)(1)(D), concerning who is entitled to benefits under a pension plan.[8]

Moreover, to apply such a rule as a matter of federal common law would be contrary to this Court's refusal to develop common law principles when ERISA itself gives authority to an agency to address the issue and the agency does not support the common law rule. See *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832, 834 (2003)

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[8] The court of appeals concluded that recognizing a waiver in this case, where the parties agreed there was no QDRO, would also conflict with the prohibition in 29 U.S.C. 1056(d)(1) against the assignment or alienation of pension benefits. Pet. App. 13a-17a; see note 15, *infra* (discussing the application of ERISA's QDRO provisions in the post-retirement context). Because respondents were not required to recognize the waiver for the independent reasons discussed in the text, there would be no reason for this Court to reach that question in this case.

If there *were* a valid QDRO, the anti-alienation provision would be inapplicable because 29 U.S.C. 1056(d)(3) expressly exempts a QDRO from that provision. Conversely, where, as here, there is *not* a valid QDRO, there is, as explained in the text, no basis for the courts to fashion a waiver rule as a matter of federal common law, whether or not ERISA's anti-alienation provision would also bar the courts from doing so. The anti-alienation provision therefore is of little independent significance in determining whether courts may require a plan to accept a waiver as part of an arrangement to enable the participant to designate his new spouse as the beneficiary of the survivor annuity in a case such as this.

(rejecting a federal common law rule requiring the plan administrator to defer to a claimant's treating physician on medical issues in connection with a claim for benefits because such a rule "lack[ed] Department of Labor endorsement"). As respondents note, the Secretary of the Treasury has issued regulations addressing the timing and content of an election to waive QJSA benefits. See Br. in Opp. 12-13 (discussing 26 C.F.R. 1.401(a)-20, Q&A-10(a), Q&A-25(b)(3)). Those regulations reflect the Secretary's view that ERISA does not require a pension plan to recognize a waiver and change in beneficiary after a participant starts receiving benefits under a QJSA.

The regulations provide that the annuity starting date, defined as "the first day of the first period for which an amount is paid as an annuity or any other form," 26 C.F.R. 1.401(a)-20, Q&A-10(b)(1), is used "to determine when a spouse may consent to and a participant may waive a QJSA." 26 C.F.R. 1.401(a)-20, Q&A-10(a). A waiver is effective only if it is made within 90 days before the annuity starting date. *Ibid.*[9] The regulations then specify that changes in marital status that occur after the plan begins payment of the annuity do not change the pre-retirement designation:

> If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date

[9] If the plan provides the written explanation required by 29 U.S.C. 1055(c)(3)(A) after the annuity starting date, the election period may extend beyond that date. 29 U.S.C. 1055(c)(8); 26 C.F.R. 1.417(e)-1(b)(3)(iv). Petitioner does not claim entitlement to such an extended election period.

> of the participant's death, except as provided in a QDRO.

26 C.F.R. 1.401(a)-20, Q&A-25(b)(3).[10] In other words, after annuity payments begin upon the participant's retirement, the spouse to whom the participant was married when payments began is entitled to the QJSA protection even if the participant and spouse later divorce. The regulation also sets forth the circumstances under which the QJSA protection will not be provided to the spouse who was married to the participant on the annuity starting date. A federal common law rule of waiver augmenting these exceptions thus would be contrary to the Treasury Department regulations, as well as to ERISA itself.[11]

B. This Case Is Not A Suitable Vehicle For Resolving The Circuit Conflict Over Whether A Pension Plan Must Recognize A Beneficiary's Waiver Of Benefits

1. Outside the QJSA context presented here, the courts of appeals are divided on whether a beneficiary's waiver of

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[10] The parenthetical phrase "unless waived and consented to by such spouse" in the regulation refers to a waiver and consent given in accordance with the special QJSA requirements, including the one set forth in 26 C.F.R. 1.401(a)-20, Q&A-10(a), discussed in the text. The waiver and consent thus must occur within 90 days before the annuity starting date or in accordance with the retroactive annuity starting date provisions described in footnote 9, *supra*.

The reference to a QDRO in the IRS regulation necessarily contemplates that the domestic relations order satisfy ERISA's requirements for a QDRO, including that it either be entered prior to retirement or, if entered post-retirement, that the terms of the plan provide for a change at that time. See note 15, *infra*.

[11] The Pension Benefit Guaranty Corporation, which pays guaranteed benefits after an underfunded defined-benefit pension plan terminates, see 29 U.S.C. 1322, requires that "[o]nce payment of a benefit starts, the benefit form cannot be changed." 29 C.F.R. 4022.8(d).

rights to ERISA benefits should be given effect as a matter of federal common law. The Sixth Circuit does not permit such waivers to override designations made in accordance with plan requirements. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Pressley*, 82 F.3d 126, 130 (1996), cert. denied, 520 U.S. 1143 (1997); *McMillan* v. *Parrott*, 913 F.2d 310, 311-312 (6th Cir. 1990). The Fourth, Fifth, Seventh, and Eighth Circuits have recognized such waivers as a matter of federal common law. See, *e.g.*, *Estate of Altobelli* v. *IBM Corp.*, 77 F.3d 78, 80-81 (4th Cir. 1996); *Brandon* v. *Travelers Ins. Co.*, 18 F.3d 1321, 1326 (5th Cir. 1994), cert. denied, 513 U.S. 1081 (1995); *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 278-280 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990); *Hill* v. *AT&T Corp.*, 125 F.3d 646, 648 (8th Cir. 1997). The highest courts in Nebraska, Texas, and New York have also recognized such waivers as a matter of federal common law. See *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 327-329 (Neb. 2005) (per curiam); *Keen* v. *Weaver*, 121 S.W.3d 721, 725-727 (Tex.), cert. denied, 540 U.S. 1047 (2003); *Silber* v. *Silber*, 786 N.E.2d 1263, 1268-1269 (N.Y.), cert. denied, 540 U.S. 817 (2003).[12]

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[12] Petitioner erroneously asserts (Pet. 6) that the Tenth Circuit recognized a waiver as a matter of federal common law in *Metropolitan Life Insurance Co.* v. *Hanslip*, 939 F.2d 904 (1991), and that the Second Circuit rejected such a recognition in *Krishna* v. *Colgate Palmolive Co.*, 7 F.3d 11 (1993). *Hanslip* held that ERISA preempted a state law automatically revoking a beneficiary designation upon divorce—the same conclusion this Court later reached in *Egelhoff*—and did not decide any question whether to recognize a federal common law waiver. See 939 F.2d at 906-907. *Krishna* held that New York law allowing a change of beneficiary by a will is preempted and would not be adopted as a matter of federal common law. 7 F.3d at 13-16. The court did not decide whether to recognize a federal common law of waiver based on some other source.

This Court's review may be necessary, in an appropriate case, to resolve that conflict. The issue is important to plan administrators, who need to know whether ERISA requires them to follow the plan's terms or whether some different rule may be imposed upon them based on federal common law when they are faced with two or more claimants to the same plan benefits. The issue is also important to persons claiming benefits because the benefits at issue are often a significant source of support for them.

Contrary to respondents' argument (Br. in Opp. 8-9), *Boggs* has not eliminated the conflict in the courts of appeals in favor of a rule prohibiting waivers under federal common law. Courts recognizing such waivers have continued to do so after *Boggs* and *Egelhoff*. See, *e.g.*, *Guardian Life Ins. Co. of Am.* v. *Finch*, 395 F.3d 238, 243 (5th Cir. 2004) ("*Egelhoff* does not undermine this court's longstanding approach of relying on federal common law" to give effect to the designated beneficiary's waiver of her rights to a life insurance policy.), cert. denied, 125 S. Ct. 2305 (2005); *Manning* v. *Hayes*, 212 F.3d 866, 873-874 (5th Cir. 2000) ("[t]he principles at work in *Boggs* are clearly inapplicable" to "disputes between a non-beneficiary claimant and the named ERISA beneficiary to life insurance proceeds"), cert. denied, 532 U.S. 941 (2001); *Melton* v. *Melton*, 324 F.3d 941, 945 (7th Cir. 2003) (adhering after *Egelhoff* to circuit precedent providing that designated beneficiary may waive interest in ERISA-regulated plan); *Strong*, 701 N.W.2d at 329 (not persuaded that *Egelhoff* undermines the waiver rule); *Keen*, 121 S.W.3d at 726 (reading *Egelhoff* to *support* use of federal common law); *Silber*, 786 N.E.2d at

1268-1269 (rejecting contention that *Egelhoff* precludes application of federal common law to recognize a waiver).[13]

2. This case, however, is not an appropriate vehicle for the Court to decide whether the terms of a plan or a rule developed as a matter of federal common law applies to a purported waiver of pension rights. That is because this case involves an attempt by a plan participant to change the surviving spouse in a QJSA *after* he retired and started to receive annuity payments. That circumstance is addressed with particular specificity in the relevant statutory and reg-

[13] Those courts that have declined to give effect to a waiver as a matter of federal common law have not ruled out reliance on federal common law to determine the identity of a beneficiary in certain unique circumstances. Cf. *Egelhoff*, 532 U.S. at 152 (not deciding whether a "slayer" statute could revoke the beneficiary status of someone who murdered a plan participant, see note 6, *supra*). For example, the Sixth Circuit has fashioned principles of federal common law to determine whether the designation of a beneficiary in plan documents was the result of fraud or forgery. *Tinsley* v. *General Motors Corp.*, 227 F.3d 700, 704-706 (6th Cir. 2000). That court also permits imposition of a constructive trust on life insurance benefits when an individual has received them pursuant to plan terms but in violation of a non-ERISA-qualified state court domestic relations order. See *Central States, S.E. & S.W. Areas Pension Fund* v. *Howell*, 227 F.3d 672, 678-679 (6th Cir. 2000). The Third Circuit's decision in this case also leaves open the possibility of developing principles of federal common law to determine entitlement to the proceeds of a life insurance policy. That is because life insurance is a welfare benefit, see 29 U.S.C. 1002(1) (defining "employee welfare benefit plan"), and the Third Circuit here rejected reliance on a federal common law rule of waiver as inconsistent with ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1). See Pet. App. 13a-17a; *id.* at 19a-20a (Becker, J. concurring). But that provision, even if it applies to limit or prevent the transfer of pension benefits (itself a difficult issue on which the United States has not reached a concluded view), would not apply to welfare benefits, such as life insurance, because it applies to pension plans but not to welfare plans. *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836-837 (1988).

ulatory provisions, and so it does not squarely implicate the broader conflict concerning waivers in other contexts. No court of appeals has required a plan administrator to recognize a waiver in this situation, and there are good reasons to believe that courts requiring recognition of waivers as a matter of federal common law in other circumstances would not do so here.

In particular, courts that have recognized waivers have done so in cases in which the participant died *before* receiving benefits. See, *e.g.*, *Finch*, 395 F.3d at 239; *Altobelli*, 77 F.3d at 79; *Brandon*, 18 F.3d at 1322; *Fox Valley*, 897 F.2d at 277; *Strong*, 701 N.W.2d at 323-324; *Keen*, 121 S.W.3d at 722; *Silber*, 786 N.E.2d at 1265-1266. In those circumstances, the amount of benefits was not at issue; instead the issue was which of two claimants, usually a former spouse on the one hand and the current spouse or decedent's estate on the other, would receive them. Although those cases resulted in litigation costs for the plan and delays in distributing benefits, they did not require the plan to pay benefits different from what the plan provided.

In this case, by contrast, petitioner seeks to require the plan to pay benefits not contemplated by the plan. The QJSA form of benefits provides an annuity to the participant based on the joint life of the participant and his or her spouse, and a surviving spouse annuity. 29 U.S.C. 1055(d). Accordingly, "the plan administrator must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits." *Hopkins* v. *AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 n.7 (4th Cir. 1997). Changing the survivor after retirement, as petitioner seeks to do here, would require a plan either to recalculate the participant's payments based on the new surviving spouse's life expectancy, or to pay benefits it had not agreed to pay by continuing the ex-

isting payments even though the actuarial basis for them has likely changed. Under the latter alternative, the age or health status of the new spouse, as compared with that of the former spouse, may create the possibility of manipulation at the expense of the plan by permitting the participant to (1) provide greater lifetime pension benefits to the new spouse (if she has a longer life expectancy) than the former spouse would have received, and then (2) compensate the former spouse in some other way for her loss of plan benefits.

Accordingly, two courts of appeals that have invoked federal common law to recognize a waiver *pre*-retirement have refused to permit *post*-retirement changes to the designation of the surviving spouse in a QJSA. See *Hopkins*, 105 F.3d at 157 ("[A]fter retirement, a participant cannot change the distribution of plan benefits [under a QJSA], even with the current spouse's approval."); *Rivers* v. *Central & S.W. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) ("This Circuit agrees with the Fourth Circuit's decision in *Hopkins* and adopts its rationale.").[14] The Eleventh Circuit also recognizes that under a QJSA governed by 29 U.S.C. 1055 (2000 & Supp. III 2003), "survivor annuity benefits are only available to a spouse who was married to the participant when the annuity payments began." *Holloman* v. *Mail-Well Corp.*, 443 F.3d 832, 841 (2006). Those decisions, and the absence of contrary authority from any other court of appeals, strongly suggest that no court of appeals would require the plan to recognize the waiver at issue here. See *Anderson* v. *Marshall*, 856 F. Supp. 604, 606-607 (D. Kan.

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[14] These decisions involve a situation, like that here, where the annuity starting date is fixed and no provision is made under the plan for a new starting date. Cf. note 7, *supra* (discussing the possibility that, consistent with ERISA, a plan could choose in certain circumstances to provide a new annuity starting date).

1994) (federal common law rule of waiver does not apply where "the defendant has retired and is not free to change his beneficiary designation").[15] The fact that the statute and regulations address the post-retirement situation with greater specificity weakens the basis for any court to fashion a federal common law rule in the post-retirement context, no matter what it may adopt for the pre-retirement context. This case therefore is not an appropriate vehicle for resolving the conflict among the courts of appeals and state courts on whether a rule fashioned as a matter of federal common law requires a plan administrator to recognize a waiver of rights to benefits under other circumstances, even in the absence of a provision in ERISA or the plan allowing such a waiver.

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[15] A separate issue, not presented here, is whether a QDRO can alter the surviving spouse designation in a QJSA after a participant retires. See *Torres* v. *Torres*, 60 P.3d 798, 820-822 (Haw. 2002) (holding, contrary to *Hopkins* and *Rivers*, that QJSA benefits do not vest on retirement). The court below suggested that petitioner could have obtained a QDRO after his retirement and divorce, despite the fact that the plan would not have permitted a change in the survivor designation at that time. See Pet. App. 17a (petitioner "has provided no reason why he could not have obtained a QDRO * * * at the time of the divorce"). That suggestion is mistaken because it conflicts with 29 U.S.C. 1056(d)(3)(D)(i), which prohibits a QDRO from requiring "a plan to provide any type or *form of benefit*, or *any option*, not otherwise provided under the plan." In any event, because petitioner has not relied on the QDRO provisions, see Pet. App. 10a n.3, 49a n.5, this case does not present the question whether a QDRO can alter the surviving spouse designation in a QJSA after a participant retires and annuity payments have commenced, where the plan does not so provide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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